

1 IN THE CIRCUIT COURT, FOURTH  
2 JUDICIAL CIRCUIT, IN AND FOR  
DUVAL COUNTY, FLORIDA

3 CASE NO.: 97-03522-CA

4 DIVISION: CV-H

5

6 ANGELA B. WIDDICK, as personal  
Representative of the Estate of  
7 ROLAND E. MADDOX, deceased,

8 Plaintiff,

9 vs.

10 BROWN & WILLIAMSON TOBACCO CORPORATION,  
a foreign corporation; LIGGETT GROUP,  
11 INC., a foreign corporation,

12 Defendants.

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16 PROCEEDINGS held before The Honorable  
17 Charles O. Mitchell, Jr., at the Duval County  
18 Courthouse, 330 East Bay Street. Jacksonville,  
19 Florida, on Thursday, May 21, 1998.

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1 P R O C E E D I N G S

2 May 21, 1998 9:00 a.m.

3 (Proceedings held in chambers; present is

4 Mr. Nyhan, Mr. Riley, Mr. Browning, Ms. Hartley  
5 and Mr. Matthews):

6 THE COURT: Good morning.

7 MR. NYHAN: Good morning, Your Honor.

8 MS. HARTLEY: Good morning.

9 THE COURT: All right. I've read the  
10 motion.

11 MR. NYHAN: Well, our motion, Judge, seeks  
12 to limit Dr. Feingold's testimony to that which he  
13 was prepared to offer at the time of his deposition.

14 And specifically we want to preclude him  
15 from relying upon any depositions or interviews with  
16 family, plaintiffs' family members, coworkers or  
17 family physicians because he hadn't read that  
18 material at the time he was deposed. He wasn't  
19 prepared to testify about it.

20 Second, he testified he hadn't read any  
21 internal documents of American Tobacco Company;  
22 therefore, he should be precluded from testifying  
23 that.

24 Third, he should not be allowed to rely  
25 on expert reports not reviewed at the time of his

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1 deposition, and fourth should not be able to rely on  
2 any independent review, his review of Mr. Maddox's  
3 pathology after the date of his deposition.

4 Bottom line is he was not -- hadn't been  
5 prepared on any of those points at the time of his

6 deposition and he shouldn't be allowed to testify  
7 about what he's done after that.

8 THE COURT: Did you make a request to  
9 redepose him after the American Tobacco Company  
10 documents became public record?

11 MR. NYHAN: Well, I'm not aware that --

12 THE COURT: I mean, are these the same  
13 documents that were produced in Minnesota? I don't  
14 know.

15 MR. NYHAN: They've been out for some  
16 time. The point is at the time of his deposition he  
17 didn't produce any of that material and said he  
18 hadn't read any of it.

19 THE COURT: I don't know about  
20 March 23rd --

21 MS. HARTLEY: I need to correct the record  
22 on that. That is absolutely not true that  
23 Dr. Feingold did not review American Tobacco Company  
24 documents.

25 He produced for the defendants stacks of

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1 documents which included American Tobacco documents.  
2 He had the Internet up at the time and invited them  
3 to ask him anything about any of the documents on  
4 there. It is not --

5 THE COURT: I saw that in the motion,  
6 okay.

7 MS. HARTLEY: I haven't read the motion,  
8 Your Honor. I just wanted to correct that, because I

9 believe that is completely misstating what happened  
10 at the deposition with regards to American Tobacco  
11 Company documents.

12 THE COURT: Well, let's go down it item by  
13 item. I guess I'm more concerned about the specific  
14 items, like do you intend to have him testify about  
15 the pathology reports? He apparently said he hadn't  
16 read them at that point.

17 MS. HARTLEY: The pathology, he had  
18 reviewed pathology reports. And one thing I want to  
19 point out to Your Honor is after -- as Your Honor  
20 knows, the plaintiff's experts are deposed and then  
21 the defendant's experts are deposed. The defendant's  
22 pathologist was deposed after Dr. Feingold.

23 I don't believe and have never seen any  
24 case law that says that the plaintiff's expert cannot  
25 read and review the deposition of the defendant's

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1 experts, which naturally come after.

2 THE COURT: I don't have a problem with  
3 that.

4 MR. NYHAN: And we're not seeking that,  
5 Judge. What we're seeking is to prevent him from  
6 testifying about any review of the pathology  
7 materials himself that he hadn't done prior to his  
8 deposition.

9 MS. HARTLEY: He has reviewed pathology  
10 records, which he had done at the time of the

11 deposition.

12 MR. NYHAN: He can testify about records,  
13 but not about slides.

14 MS. HARTLEY: Your Honor, I'm not sure if  
15 he's going to be testifying about an actual look --  
16 looking at the slides.

17 THE COURT: Have you read this?

18 MS. HARTLEY: But he may. No, Your Honor,  
19 I haven't.

20 MR. MATTHEWS: Can I make a suggestion?

21 THE COURT: Yes.

22 MR. MATTHEWS: We're intending to read the  
23 deposition of Irwin Tucker.

24 THE COURT: Well, that's what I was  
25 thinking.

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1 MR. MATTHEWS: Then we have a copy of the  
2 deposition of Dr. LeBow, Mr. LeBow. We intend to go  
3 ahead with that, so that's going to take the morning.

4 THE COURT: I was going to say, if you want  
5 to redepose Dr. Feingold you can start in ten  
6 minutes, anytime you want this morning and ask him  
7 whatever questions you choose, Mr. Nyhan.

8 MR. NYHAN: Practically, that isn't  
9 feasible for me to do that right now. I don't want  
10 to miss the presentation to the jury to see how  
11 they're responding.

12 All we're asking, Judge, is don't let him  
13 testify about the review of the pathology slides.

14 We're not talking about reports or our expert's  
15 deposition, just the pathology slides.

16 THE COURT: Well, does he intend to do that  
17 or do you intend to have him do that?

18 MR. MATTHEWS: I honestly don't know.

19 THE COURT: We need to find out, because if  
20 he doesn't intend to do that, that's something we  
21 don't need to worry about if that's not going to  
22 happen.

23 MR. NYHAN: Second, he shouldn't be allowed  
24 to testify about his review of depositions of family  
25 members or interviews of family members, coworkers or

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1 family doctors. He didn't review that. All of that  
2 was available at the time.

3 THE COURT: According to your motion, what  
4 he hadn't done is received information from  
5 Ms. Hartley concerning that.

6 MR. NYHAN: What he had done is received  
7 information from Ms. Hartley. And he should be  
8 limited to the information that was made available to  
9 him as of the time of his deposition.

10 We shouldn't be sandbagged after that,  
11 with them holding them before he's deposed and then  
12 dumping a lot of stuff on him after he was deposed.  
13 That's all we're looking at, Judge.

14 THE COURT: Well, I don't have a problem  
15 with you redeposing him, Mr. Nyhan. I don't mean you

16 personally, okay. I have counted at least seven  
17 attorneys that are representing Brown & Williamson.  
18 And, you know, everyone seems to be working  
19 18 hour days. So I don't know if you can pull  
20 anybody off of something else to do this.  
21 But I guess what I am concerned about, if  
22 you depose him and if it's a problem that you cannot  
23 or don't have time to confront him, then I can -- we  
24 can revisit your motion.  
25 MR. NYHAN: All right.

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1 THE COURT: But first we need to know  
2 what the doctor is going to testify to that is  
3 objectionable, not what he might testify to or what  
4 he might say.  
5 I just think that's a better way to do it.  
6 And I don't know that it requires your presence  
7 there, even though you would probably like to be  
8 there.  
9 MR. NYHAN: Why don't we hear from them and  
10 then we will pursue it later.  
11 MS. HARTLEY: That's fine. I know -- I can  
12 tell you that he will be testifying to internal  
13 company documents and that he did review those prior  
14 to his deposition.  
15 THE COURT: Well, what I'm picturing, if  
16 you depose him this morning, you ask him which ones.  
17 And if they're documents that were not produced at  
18 the deposition and they were not documents that were

19 produced at your expert's deposition, then --

20 MR. NYHAN: How about if they give us those  
21 documents that they claim he's going to rely upon and  
22 then we can make a decision of where to go?

23 THE COURT: From Mr. Maddox specifically, I  
24 wouldn't have a problem with that. But what I have a  
25 problem with, if he is presented as an expert on lung

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1 cancer, and I assume that's why they have him here,  
2 it would -- I am assuming it would take a truckload  
3 to bring all the documents to present to you that  
4 he's relied on, because he's relying on all of his  
5 experience from his entire medical career.

6 MR. NYHAN: That's really not what we're  
7 talking about, Judge.

8 THE COURT: I understand that. And what  
9 I'm saying is if you can specifically -- I think that  
10 if -- that you are certainly entitled to know which  
11 documents, that are specific to this case, he's  
12 relied on, like Mr. Maddox's medical records and even  
13 the facts of his smoking.

14 Although, I'm not as concerned as you  
15 apparently are whether Ms. Hartley told him that  
16 Mr. Maddox smoked two packs a day or whether he got  
17 it out of the deposition. I think he can rely on  
18 those facts to give his opinion. And you can show on  
19 cross-examination that he should -- that they were  
20 not reliable, if they weren't.



21                   But, so on the case-specific documents, I  
22    would -- I would require that they provide them for  
23    you or tell them what he used.

24                   MR. NYHAN:   Your Honor, our motion goes  
25    to preventing him from testifying about that

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1    case-specific material not made available to him  
2    before his deposition.

3                   That's all we're seeking, keep that out  
4    because it hadn't been given to him.

5                   THE COURT:   Mr. Nyhan, but what I'm saying  
6    is the same thing.   We just need to take one more  
7    step.

8                   You need to identify that and then see if  
9    you have an argument with it.   They then can argue  
10   that he did provide it at the time or whatever.   We  
11   can have a hearing after the deposition.

12                  MR. NYHAN:   Sure.

13                  THE COURT:   Go ahead.

14                  MR. NYHAN:   I'm sorry, Judge.   What we did  
15   argue in the motion is they hadn't given him any  
16   depositions of family members or any of the fact  
17   witnesses.   Therefore, since they didn't give it to  
18   him prior to his deposition and have him review it,  
19   we shouldn't be forced now either to take his  
20   deposition or to allow him -- he shouldn't be allowed  
21   to testify about stuff that they withheld from him  
22   prior to his deposition.   That's the fact witness  
23   stuff.

24 THE COURT: The reason I say take his  
25 deposition, I want to -- I want a clearer picture

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1 in order to rule on your motion of what specific  
2 documents you're talking about.

3 MR. NYHAN: Okay. Perhaps they could  
4 simply identify that.

5 THE COURT: They may be able to do that.  
6 But I'm talking about you can have the opportunity to  
7 take his deposition, if you wish.

8 On the other hand, if they identify  
9 the documents and you have no problem with those  
10 documents either because they were provided before  
11 the deposition or at the deposition or it doesn't  
12 matter to you because of the nature of the documents,  
13 then we can go on from there.

14 But I'm having difficulty saying -- in  
15 making general rulings that you can't use any  
16 documents that you didn't produce at the deposition.  
17 And I don't know what those documents are, but you  
18 can't use them.

19 Now, we can talk about what they are and  
20 identify them and, if we do, even if you have to  
21 depose Dr. Feingold to identify them, but I don't  
22 know that that's necessary, then I can determine  
23 should this document be used, and hear argument on  
24 both sides and make a ruling.

25 MR. NYHAN: But we have got a simple issue.

1 Is Dr. Feingold going to rely upon depositions of  
2 family members and interviews of fact witnesses not  
3 made available, which he hadn't reviewed prior to his  
4 deposition.

5 THE COURT: It may be simple. But it  
6 doesn't seem, you know, you say in your motion -- and  
7 I haven't heard from them yet. But you say in your  
8 motion that he states in his deposition that any  
9 facts concerning Mr. Maddox he got from Ms. Hartley  
10 or Mr. Wilner, whatever, but from the attorneys.

11 MR. NYHAN: Right.

12 THE COURT: I don't think that that  
13 precludes him from testifying to those facts that he  
14 got from Ms. Hartley and Mr. Wilner.

15 MR. NYHAN: I agree.

16 THE COURT: So I don't know what they are,  
17 you know. I mean, if you have specific objections  
18 that they didn't tell him something that he could  
19 have gotten from Mrs. Maddox's deposition and maybe  
20 did later get from Mrs. Maddox's deposition, then I  
21 can make a ruling on that specific area.

22 MR. NYHAN: That's specifically what we're  
23 asking you to rule upon.

24 THE COURT: Then I have to know what we're  
25 talking about.

1 MS. HARTLEY: Right, Your Honor. And  
2 I think we can solve this after. Go in and start the  
3 deposition of Tucker, Floyd can talk with Woody, and  
4 this can be resolved. If it can't be resolved, they  
5 can depose Dr. Feingold. If it can't be resolved --  
6 these two depositions will take us to lunch. And  
7 then we will argue before Your Honor.

8 THE COURT: For the record, Dr. Feingold is  
9 available now, right?

10 MS. HARTLEY: Yes.

11 THE COURT: For you to talk to and for you  
12 to depose?

13 MR. MATTHEWS: I've got the videotape of  
14 LeBow. I'll give that to Stephanie.

15 MS. HARTLEY: We will start with Tucker and  
16 get this trial going.

17 MR. NYHAN: With respect to the American  
18 documents, if they can identify which documents he's  
19 going to be talking about, then we can determine if  
20 we're going to have an argument. See, the problem  
21 with this core dump of documents, they're saying find  
22 it on the Internet. You can't do that in a  
23 deposition.

24 THE COURT: I don't think that's  
25 unreasonable to give them a general list of --

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1 MS. HARTLEY: There's -- I'm sorry.

2 THE COURT: I'm assuming something that I  
3 don't know is true, that the American documents were  
4 those that were recently produced.

5 MS. HARTLEY: Some were not recently  
6 produced.

7 THE COURT: Well, I'm talking about at  
8 least the ones that were recently produced in  
9 Minnesota.

10 And, you know, I know you've been round and  
11 round this with Judge Weatherby. He's talked to me  
12 about it, so I'm familiar with some of it. And we  
13 even discussed the possibility, or at least y'all did  
14 with him, of delaying the trial if there were too  
15 many of the Minnesota documents involved because of  
16 the volume of them. And apparently that's already  
17 been disposed of.

18 But I don't think it's unreasonable to give  
19 them a list of the Minnesota documents, for lack of  
20 a better -- the American Tobacco Company, Minnesota  
21 documents, for lack of a better term.

22 MS. HARTLEY: Well, Your Honor, I can tell  
23 you right now that --

24 THE COURT: That Dr. Feingold has seen and  
25 used.

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1 MS. HARTLEY: -- Dr. Feingold has seen all  
2 the American Tobacco Company that are on the Blilley  
3 web site on the Internet. They don't want him to be  
4 able to rely upon those, I think that's impossible.

5           You can't go into somebody -- a doctor's  
6 head and say, you know, I want you to take this  
7 series -- this information and pretend like you  
8 never saw it.

9           In addition, if they ask him on  
10 cross-examination whether he saw this document, just  
11 because he didn't see that document at the time of  
12 the deposition, does that mean he's supposed to say  
13 no, when, I mean, that would be against his oath?

14           The documents that we will introduce  
15 through Dr. Feingold, which will be the evidence of  
16 his trial -- at his trial, are the ones we have  
17 identified to them already in the books. He is --  
18 we are not going to introduce additional documents  
19 through Dr. Feingold. But that doesn't mean that he  
20 hasn't read them.

21           And if he's asked on cross-examination if  
22 he's read a certain document that was on the Blilley  
23 March 20, whenever they were -- those documents were  
24 posted on the Internet, he's certainly going to  
25 answer that he did read it and that he is prepared to

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1 comment on it.

2           THE COURT: You said asked on cross?

3           MS. HARTLEY: If he's asked on cross about  
4 that.

5           MR. NYHAN: I think that's the issue.

6           MS. HARTLEY: Right. I'm just saying this

7 is the point that we're not --

8 THE COURT: Y'all aren't going to intend to  
9 ask him on direct?

10 MS. HARTLEY: We are not going to introduce  
11 documents on direct that may not have been provided  
12 to them.

13 THE COURT: All I'm saying is documents you  
14 intend to discuss with Dr. Feingold on direct  
15 examination, you need to give them a list. You just  
16 told me you have already done that.

17 MS. HARTLEY: Yes, we have, Your Honor.

18 MR. NYHAN: Your Honor, they have given us  
19 notebooks full of a number of documents, including  
20 many of which are privileged. And I guess we will  
21 get to that at some point.

22 MS. HARTLEY: Your Honor, we made a lot of  
23 progress on the privileged documents. Jackie Terry  
24 sent me a list, we deleted some. There, at the  
25 moment, doesn't seem to be a problem. We agreed on

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1 the few books that we would introduce. Some have  
2 privilege, some don't have privilege.

3 You know, I have discussed that with your  
4 colleague. And I don't think there is a problem.

5 MR. NYHAN: I have not had an opportunity  
6 to discuss it with her. I understand that we are  
7 not going to use -- you're not going to use any  
8 privileged documents this morning?

9 MS. HARTLEY: No, because we're reading the

10 deposition of Dr. Tucker and LeBow. So there won't  
11 be any documents.

12 MR. NYHAN: So we will have to take it up  
13 later.

14 THE COURT: Then I can focus on the  
15 motion. But what I'm hearing is they don't intend to  
16 introduce some of the documents that you're concerned  
17 with.

18 MR. NYHAN: Right. And then, Floyd, you'll  
19 get back to me on this other issue?

20 MR. MATTHEWS: Right.

21 MR. NYHAN: I think we have resolved that  
22 for the moment, Your Honor.

23 THE COURT: Then are you ready to proceed?  
24 You need about five minutes?

25 MR. MATTHEWS: Yes, let me give her the

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1 tape.

2 THE COURT: I'll be around in about five  
3 minutes.

4 (In-chamber proceedings concluded;  
5 proceedings resumed in open court)

6 THE BAILIFF: All rise, please. This Court  
7 is back in session. Please be seated.

8 (Side-bar conference, Court and counsel)

9 THE COURT: Are you ready to proceed,  
10 Ms. Hartley or Mr. Matthews?

11 MS. HARTLEY: Yes, Your Honor.



12 THE COURT: Which one is going to do it?  
13 MR. MATTHEWS: She's going to do it. I'm  
14 going to run back to the office.  
15 MS. HARTLEY: Can I have Sean go and sit in  
16 the --  
17 THE COURT: Yes, but let's wait till you  
18 call the witness. Mr. Cronin, you can have a seat at  
19 the counsel table. It doesn't matter.  
20 MR. CRONIN: Thank you, Your Honor.  
21 THE COURT: Are you ready? Just let me  
22 know when you're ready.  
23 MR. NYHAN: Yes, we are all set.  
24 THE COURT: Bring them in, please.  
25 (Jury enters courtroom)

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1 THE COURT: Good morning, ladies and  
2 gentlemen. Again, I apologize to you for the delay.  
3 The attorneys and I had something come up that we  
4 were working on. So I'm sorry to keep you back  
5 there. But we didn't anticipate doing that and we  
6 will try to avoid it in the future.  
7 Call your next witness, please,  
8 Ms. Hartley.  
9 MS. HARTLEY: Your Honor, we call Irwin  
10 Tucker. We will read the deposition of Irwin Tucker  
11 taken July 28th.  
12 Sean Cronin of our office will be reading  
13 the part of Irwin Tucker, who was in the research  
14 department of Brown & Williamson Tobacco Company. As

15 I said, the deposition was taken July 28th, July 29th  
16 and October 24th of 1997.

17 THE COURT: All right. Again, ladies and  
18 gentlemen, you are to treat this testimony just as if  
19 Dr. Tucker were sitting on the stand today answering  
20 the questions. Of course, Mr. Cronin is going to  
21 read his answers.

22 (The following transcript was read):

23 Q Would you please state your full name for  
24 the record, sir.

25 A Irwin W. Tucker.

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1 Q Mr. Tucker, as I understand it you're a  
2 chemist, correct?

3 A Yes.

4 Q All right. Do you have any training as a  
5 medical doctor?

6 A No.

7 Q Are you licensed to practice medicine?

8 A No.

9 Q Do you claim to be an expert in the causes  
10 of lung cancer?

11 A No.

12 Q Do you claim to be an expert in the field  
13 of epidemiology?

14 A No.

15 Q Have you ever conducted an epidemiologic  
16 study?

17 A No.

18 Q Have you ever conducted any studies  
19 concerning a relationship between cigarette smoking  
20 and lung cancer?

21 A No.

22 Q Do you consider yourself to be a  
23 statistician?

24 A No.

25 Q It's my understanding, sir, that you went

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1 to work at the Liggett & Myers Tobacco Company at  
2 some point in time; is that correct?

3 A Yes.

4 Q Could you tell me when you went to work for  
5 Liggett & Myers?

6 A 1948.

7 Q How long did you work there?

8 A About two years.

9 Q When you first went to work for Liggett &  
10 Myers, what was your job position?

11 A I was a bench chemist.

12 Q What do you mean when you say bench  
13 chemist?

14 A Well, I worked in the laboratory and  
15 conducted chemical experiments.

16 Q Was it better to have a low nicotine level  
17 or a high nicotine level?

18 A No, nicotine was considered a flavor  
19 component.

20 Q Nicotine was considered a flavor component  
21 of tobacco?

22 A Yes.

23 Q Was it better to have a higher level of  
24 nicotine in the tobacco or a lower level of nicotine  
25 in the tobacco?

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1 A No, I think just one intermediate level.

2 Q If nicotine was a flavorant in cigarettes  
3 and an advantage because of its good flavor, was  
4 there any reason why nicotine wouldn't be maximized  
5 to maximize the good flavor of the cigarette?

6 My question to you is if the nicotine was a  
7 flavorant advantage, that is it made the cigarette  
8 taste better, why would not a higher nicotine content  
9 be advantageous in the flavoring of the cigarette?

10 A Well, I think if you tend to get it too  
11 high, it makes the cigarette stronger.

12 Q What do you mean when you say stronger?

13 A A fuller taste.

14 Q Pardon?

15 A A heavier taste.

16 Q A heavier taste?

17 A Yes.

18 Q Was mildness something that you, as a  
19 chemist, strived for when you worked for Liggett  
20 & Myers, mildness in cigarettes, that is?

21 A Yes.

22 Q What was the purpose of blending tobaccos  
23 in the production of cigarettes?  
24 A To come up with a distinctive taste of the  
25 smoke.

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1 Q Did it also make the product smoother?  
2 A Yes.  
3 Q Did anyone employed by Liggett & Myers ever  
4 discuss with you any association between cigarette  
5 smoking and lung cancer?  
6 A No.  
7 Q To your knowledge, was any research  
8 conducted by Liggett while you were employed there  
9 concerning any adverse health effects from smoking  
10 their cigarettes?  
11 A No.  
12 Q To your knowledge, did Liggett ever fund  
13 any such research?  
14 A They may have with Arthur D. Little in  
15 Boston.  
16 Q I was asking, really, to your knowledge.  
17 Do you have any knowledge of them ever  
18 funding any research concerning the health effects of  
19 smoking and their cigarettes?  
20 A No.  
21 Q During the time that you worked there, are  
22 you aware of any attempts by Liggett & Myers to  
23 advise its customers that several researchers had  
24 found cigarette smoking to be a significant factor in

25 the production of lung cancer?

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1 A No.

2 Q When you were working for Liggett during  
3 the period of 1948 through 1952, did Liggett continue  
4 its efforts to make smooth, good-tasting cigarettes?

5 A Yes.

6 Q Are you aware of any research which ever  
7 showed that Liggett cigarettes were safer than any  
8 other cigarette?

9 A No.

10 Q At some point in time, did you become  
11 employed at the Brown & Williamson Tobacco Company?

12 A Yes, sometime later.

13 Q Is that in April of 1953?

14 A Yes.

15 Q Can you tell me what product Brown &  
16 Williamson Tobacco Company made?

17 A They made Viceroy cigarettes and a Kool,  
18 Kool.

19 Q Viceroy and Kool?

20 A Yes.

21 Q Did they make any other tobacco product, to  
22 your knowledge?

23 A I think they made a cigarette called  
24 20 Grand.

25 Q What was your position when you began your

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1 employment at B&W?

2 A Director of research.

3 Q Did you serve as the director of research  
4 for Brown & Williamson from 1953 until you left there  
5 in 1960?

6 A Yes.

7 Q And were you hired for that position by Tim  
8 Hartmett?

9 A Yes.

10 Q At the time he hired you, was he the  
11 president of Brown & Williamson?

12 A Yes, he was.

13 Q Was it your assumption in the manufacture  
14 of cigarettes that it would be inhaled?

15 A Yes.

16 Q Was part of the design of the cigarette to  
17 enhance the ability of the user to inhale it?

18 A Yes.

19 Q What were your job duties as director of  
20 research at Brown & Williamson?

21 A Well, we had certain quality control tests  
22 going on and also development, improvement of  
23 filters.

24 Q When you began working at Brown &  
25 Williamson in 1953, were any of their cigarettes

1 filtered?

2 A Yes.

3 Q Which one?

4 A The Viceroy.

5 Q Was Kool filtered at the time?

6 A No.

7 Q Was there any belief at Brown & Williamson

8 when you began working there in 1953 that a filtered

9 cigarette was a safer cigarette than a nonfiltered

10 cigarette?

11 A Would you mind repeating the question?

12 Q Yes, sir.

13 When you began working at Brown &

14 Williamson in 1953, were you aware of any belief by

15 anyone at Brown & Williamson that filtered

16 cigarettes, such as their brand Viceroy, were safer

17 than unfiltered cigarettes such as their brand Kool?

18 A No.

19 Q Throughout the time that you were employed

20 at Brown & Williamson, did anyone ever express to you

21 a belief that filtered cigarettes were safer than

22 nonfiltered cigarettes?

23 A No.

24 Q Were your job duties at Brown & Williamson

25 -- did they also involve the inspection of tobacco?

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1 A Yes.

2 Q Was it similar to what you had done at



3 Liggett & Myers?

4 A Oh, we had a much more involved program at  
5 Brown & Williamson.

6 Q Would you explain the difference to me,  
7 please, sir.

8 A Well, we, we actually went out to farms and  
9 -- before making of our year's crop, and sampled the  
10 tobacco and analyzed it.

11 Q Were you again analyzing it for sugar  
12 content and nicotine content?

13 A Yes.

14 Q So you had a choice between selecting a  
15 leaf with low nicotine or one with high nicotine; is  
16 that correct?

17 A Yes.

18 Q And as an employee of Brown & Williamson,  
19 you would make that decision, you personally?

20 A By and large, yes, with the -- with the  
21 concurrence of other executives.

22 Q All right, sir. And did you also inspect  
23 the tobacco for sugar?

24 A Yes.

25 Q Anything else that you would inspect the

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1 tobacco for?

2 A No.

3 Q How was the tobacco for Brown & Williamson  
4 cigarettes processed?

5 A Well, it was brought to the stemmery and

6 separated from the stems and then put into hogs'  
7 heads for aging.

8 Q Can the processing of tobacco alter its  
9 nicotine content?

10 A Yes.

11 Q Did you monitor the nicotine content  
12 throughout the processing of the tobacco?

13 A Yes.

14 Q Did you make decisions between high and low  
15 nicotine throughout the processing of tobacco?

16 A Yes.

17 Q You attended a meeting in December of 1953  
18 at the Plaza Hotel; am I correct?

19 A Yes.

20 Q And at that meeting there had gathered a  
21 number of CEOs from the major tobacco companies in  
22 this country, correct?

23 A Yes.

24 Q Were the other CEOs that were present at  
25 that meeting -- did they express any knowledge

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1 concerning the statistical studies that had been done  
2 regarding cigarettes and lung cancer?

3 A I can't recall any specific. But I'm sure  
4 they, they -- they all shared a common view that they  
5 were not significant.

6 Q And that's what the meeting was about, was  
7 it not, to discern or discuss the industry's

8 response --

9 A Right.

10 Q -- to those studies?

11 A Yes, those studies and others.

12 Q The mice study?

13 A Yes.

14 Q Mouse study.

15 Any others beside the statistical studies

16 and the mice study?

17 A No, that's it.

18 Q In 1954, were you aware of any statistical

19 studies that concluded that cigarette smoking was not

20 associated with lung cancer?

21 A I can't recall.

22 Q Did the Hill and Knowlton firm have

23 anything to do with arranging of the meeting at the

24 Plaza Hotel in 1953?

25 A I'm not -- I don't think they had anything

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1 to do with the arranging the meeting.

2 Q They were in attendance at the meeting,

3 were they not?

4 A Yes, at some point.

5 Q At what point?

6 A After the presidents met and they decided

7 to entertain proposals from public relations

8 organizations.

9 Q And they -- did the presidents ultimately

10 retain the Hill and Knowlton firm?

11 A Yes.

12 Q Did the presidents decide at that meeting  
13 that they would -- that there would be a joint effort  
14 undertaken by the tobacco industry to address the  
15 publicity problem?

16 A Yes.

17 Q After the TIRC was formed at the Plaza  
18 Hotel --

19 A Yes.

20 Q -- did it obtain office space somewhere?

21 A I think it was provided by Hill and  
22 Knowlton.

23 Q It's in the same building as Hill and  
24 Knowlton?

25 A I think so, yes.

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1 Q Did they have any employees, the TIRC, I  
2 mean?

3 A No.

4 Q Did they have people that performed staff  
5 work at their offices?

6 A At Hill and Knowlton's offices?

7 Q Well, they were in the building of Hill and  
8 Knowlton, I understand.

9 Were they actually in the office of Hill  
10 and Knowlton?

11 A In close proximity.

12 Q And Hill and Knowlton supplied the

13 employees, didn't they?  
14 A Yes.  
15 Q Who did Mr. Hamner work for?  
16 A American Tobacco Company.  
17 Q And Mr. Parmelee?  
18 A Lorillard.  
19 Q Mr. Duploy?  
20 A Philip Morris.  
21 Q And Grant Clark?  
22 A RJ Reynolds.  
23 Q Who served on the TIRC from Hill and  
24 Knowlton?  
25 A I don't know if they considered them a

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1 member of the ITC.  
2 Q They were at the meetings, weren't they?  
3 A Usually, yes.  
4 Q Who normally was there?  
5 A Tom Hoyt.  
6 Q You were the chairman of ITC, correct?  
7 A Yes.  
8 Q And one of the functions of the ITC was to  
9 locate a chairman of the scientific advisory board?  
10 A Yes.  
11 Q Well, was one of the important attributes  
12 of such a chairman, that is of the scientific  
13 advisory board, that he be competent?  
14 A Yes.  
15 Q How was competence determined?

16           A     Determined by his history of scientific  
17     activities.  
18           Q     You wanted somebody that was knowledgeable  
19     in science?  
20           A     Yes.  
21           Q     And medicine?  
22           A     Medicine?  
23           Q     Epidemiology?  
24           A     Yes.  
25           Q     Was one of the other requirements that they

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1     have an open mind?  
2           A     Yes.  
3           Q     What was meant by having an open mind?  
4           A     Not having any fixed position with respect  
5     to whether or not smoking of cigarettes caused lung  
6     cancer.  
7           Q     How would you go about determining if a  
8     doctor had an open mind?  
9           A     Just by questioning him.  
10          Q     If you were questioning a doctor and he  
11     indicated that he was of the opinion that the studies  
12     that had been done regarding the association between  
13     cigarette smoking and lung cancer were valid, at  
14     least on their face, would that disqualify him?  
15          A     Well, that wouldn't indicate he had an open  
16     mind.  
17          Q     That would indicate that his mind was

18 closed on the subject?

19 A Yes.

20 Q Who conducted the interviews regarding the  
21 chairmanship of the scientific advisory board?

22 A Myself, Bob Duploy and Grant Clark.

23 Q Did you ultimately choose Dr. Little for  
24 that position?

25 A Yes, when it was Cook Little.

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1 Q And he had -- had he published any research  
2 on lung cancer?

3 A I don't recall specifically.

4 Q Had he published any research concerning  
5 cigarette smoking?

6 A Not to my knowledge.

7 Q Had he published any epidemiologic studies  
8 at all?

9 A I would expect so.

10 Q Was he an epidemiologist?

11 A I really don't recall that specifically.

12 Q How did he demonstrate to you that he had  
13 an open mind?

14 A He had been a university president and he  
15 operated the Jackson Memorial Hospital Research  
16 Facility up in Maine.

17 Q Did you talk to him about the Wynder  
18 studies?

19 A Yes.

20 Q Did he say that he -- did he read them?

21           A     I'm sure he did.  
22           Q     Did he agree with them?  
23           A     I'm sure he found exception.  
24           Q     Pardon, sir?  
25           A     I'm sure he found exception to them.

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1           Q     He took exception to those?  
2           A     Yes, to some facets of them.  
3           Q     Did he take exceptions to them even before  
4 he was selected as a chairman of the scientific  
5 advisory board?  
6           A     I believe so.  
7           Q     How many doctors did you interview for the  
8 chairmanship?  
9           A     Three or four.  
10          Q     How did you get the three or four names to  
11 interview?  
12          A     They were suggested by various members of  
13 the ITC.  
14          Q     Mr. Hoyt was involved with the selection  
15 process with Dr. Little, as the chairman of the  
16 scientific advisory board, wasn't he, sir?  
17          A     Yes.

18                   (Change of reporter, 9:45 a.m.)

19  
20  
21  
22



23

24

25

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1 Q Was Mr. Hoyt a doctor?

2 A No.

3 Q Was he a scientist?

4 A No.

5 Q Was he a statistician?

6 A No.

7 Q He was a public relations man, wasn't he,  
8 sir?

9 A Yes.

10 Q You were the chairman and then became a  
11 member of the ITC, am I correct?

12 A Yes.

13 Q And the purpose of the ITC, one of its  
14 purposes, was to provide information to the  
15 Scientific Advisory Board concerning what  
16 ingredients were placed in cigarettes, correct?

17 A Just a general information regarding the  
18 manufacturing and the nature of the final product.

19 Q All right, sir. And that information was  
20 provided then to the researchers who were evaluating  
21 those cigarettes to determine whether or not they  
22 cause cancer?

23 A Yes.

24 Q And I believe you previously testified  
25 that that was an important information for

1 researchers to have?

2 A Yes.

3 Q Did you -- well, let me go back to 1953  
4 when you joined Brown & Williamson. It was a while  
5 ago, wasn't it?

6 A Yes.

7 Q And you came to work as a researcher for  
8 Brown & Williamson?

9 A Yes.

10 Q Now, when you were hired as director of  
11 research, who did you report to?

12 A Tim Hartmett.

13 Q Directly to the head guy?

14 A Yes.

15 Q Now, one of the things that researchers  
16 have to do is they have to read scientific  
17 literature, right?

18 A Yes.

19 Q They have to be aware of it, right?

20 A Yes.

21 Q And you were instructed that it was  
22 important for Brown & Williamson to keep abreast of  
23 the medical and scientific literature on cigarettes?

24 A I don't recall that specifically, but in  
25 general, yes.

1           Q     Regardless of whether you were instructed,  
2     did you understand it to be something the company  
3     was obligated to do?

4           A     Yes.

5           Q     And who at the company was obligated to  
6     review the medical and scientific literature  
7     relating to cigarettes? Is that your job?

8           A     That was my job.

9           Q     Did you delegate that to anyone else  
10    during the time you were at Brown & Williamson, or  
11    did it remain your responsibility?

12          A     Yes, but I had several assistants later.

13          Q     How about in 1953, did you have  
14    assistants?

15          A     No.

16          Q     So in 1953 was there anyone but you who  
17    had -- who had the ultimate responsibility of  
18    keeping abreast of the medical and scientific  
19    literature about cigarettes?

20          A     No, there was no one else.

21          Q     Did you have on your staff a medical  
22    doctor familiar with, an expert, in the treatment of  
23    human disease?

24          A     No.

25          Q     Did you have on your staff an

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1     epidemiologist?

2 A No.

3 Q Did you have on your staff a statistician?

4 A No.

5 Q You've told us previously that you do not  
6 claim expertise in epidemiology and statistics; is  
7 that right?

8 A Right.

9 Q So when papers on epidemiology and  
10 statistics were brought to your attention, what did  
11 you do?

12 A Did the best I could.

13 Q When you got there in 1953, did you go to  
14 the main library -- to the medical library, to any  
15 library, to research the question of whether Brown &  
16 Williamson products were safe for human consumption?

17 A No.

18 Q You didn't go and even look to see what  
19 the medical literature was on whether Brown &  
20 Williamson's products were safe?

21 A 70 million people were using it, using  
22 them.

23 Q So 70 million people were using, and how  
24 many were getting sick and dying?

25 A A small fraction.

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1 Q Well, how many, sir?

2 A I don't know specifically how many.

3 Q Wait. You said that -- you thought that

4 you didn't need to go look at the literature to see  
5 whether the products were killing people because 70  
6 million people were using them, right?

7 A Yes.

8 Q Did Brown & Williamson have on the  
9 premises a medical library?

10 A No.

11 Q Okay. Now, when you -- in 1953 what tests  
12 did Brown & Williamson Tobacco Company do to verify  
13 that its products were safe, if any?

14 A Just the historical records.

15 Q Well, let's be a little more specific, if  
16 we can. Do you -- did you do any tests yourself to  
17 determine whether the products were safe?

18 A No, other than smoke them myself.

19 Q You smoked them?

20 A Yes.

21 Q And you think that that was your way of  
22 determining whether they were safe?

23 A Well, in part.

24 Q So you think that you -- that that was a  
25 scientific evaluation of the product for you -- was

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1 for you to smoke it?

2 A In part.

3 Q In part; is that right?

4 A Yes.

5 Q So the scientific method that you were  
6 using was what? Would you describe for me the

7 experiment?

8 A We had a taste laboratory --

9 Q Yeah.

10 A -- in which people were put in a booth and

11 given various samples to --

12 Q Uh-huh (affirmative).

13 A -- compare.

14 Q Okay. So how would that determine whether

15 a product was safe?

16 A Well, if they were unsafe, there might

17 have been a reaction.

18 Q Okay. And what if somebody got cancer 30

19 years after smoking, how would you know that?

20 A Well, obviously you're not going to tell

21 from one taste test what's going to happen 30 years

22 from now.

23 Q Do you know what a latency period is?

24 A Yes.

25 Q What is it?

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1 A It's a time before something shows up.

2 Q Okay. And did you ever read any articles

3 about how long it typically is between the time that

4 someone is exposed to a carcinogen and the time the

5 cancer developed?

6 A No.

7 Q Now, let's go back to these tests. So

8 Brown & Williamson conducted taste tests of its

9 cigarettes, right?

10 A Right.

11 Q And people were asked to smoke them, and

12 if they had a bad reaction, then you might know

13 something was wrong with the cigarette, right?

14 A Right.

15 Q How long did you look at these people

16 after they smoked it?

17 A It was a revolving panel.

18 Q Okay. And how long did you follow up with

19 these people?

20 A Several years.

21 Q All right. Other than this taste testing,

22 what tests did Brown & Williamson do while you were

23 there to verify or establish the safety of its

24 products?

25 A Well, some of the consumers occasionally

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1 wrote in, commented.

2 Q Consumers wrote in and commented on what?

3 A On their opinion of the cigarettes.

4 Q Okay. And you kept a file on those?

5 A Yes.

6 Q Other than these write-ins from the

7 consumers and the taste tests, did Brown &

8 Williamson at the time that you were there conduct

9 any tests on its products to determine whether it

10 was safe for human consumption?

11 A No.

12 Q Now, when you attended the meeting in 1953  
13 or '54 -- the first meeting at the Plaza Hotel,  
14 right?

15 A Yes.

16 Q Did you have in your possession -- let me  
17 get this straight, bear with me.

18 Did you have in your possession  
19 comprehensive and authoritative scientific material  
20 which completely refuted the health charges made  
21 against the industry?

22 A No.

23 Q Did you ever suggest to Brown & Williamson  
24 Tobacco Company that they conduct tests on the  
25 biologic species to determine whether cancer could

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1 be induced by elements in the cigarette smoke?

2 A No.

3 Q Did you review in 1953 the results of  
4 Doctors Wynder and Graham's experiments where  
5 cigarette tar was applied to the backs of mice?

6 A Yes.

7 Q And cancer was induced?

8 A Yes.

9 Q Did Brown and Williamson attempt to  
10 duplicate or verify these procedures in its own  
11 laboratories?

12 A No.

13 Q Did you -- at the time you read the 1953



14 Wydner-Graham results, did you yourself conclude  
15 that the experimental procedures had been flawed?

16 A Yes. I believe that they had a  
17 supersensitive mouse that they were using, and  
18 the -- the application of condensed tobacco smoke  
19 was unrealistic.

20 Q Unrealistic in what way?

21 A In that -- that's not the way a human  
22 being would be confronted with the assault.

23 Q Were any modifications or design changes  
24 done on the Viceroy or Kool product from 1953 until  
25 1960, the time you were there, which modifications

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1 or design changes were specifically made to reduce  
2 the hazards of the product, if any, to the  
3 consumer?

4 A Well, the filters were constantly being  
5 tested for improvement.

6 Q Okay. So filters were being tested?

7 A Yes.

8 Q Okay. That's one. Is there anything  
9 else?

10 A Well, I think the paper was modified.

11 Q Okay. How was it modified?

12 A To burn slower or faster.

13 Q Which one, slower or faster, or both?

14 A Maybe to burn faster.

15 Q Okay. And was this done in an attempt to  
16 reduce the hazard of the product to the consumer?

17 A Maybe in the public's mind.

18 Q Well, let's first say in the mind of the  
19 designers of the product, what was done in your mind  
20 to reduce the hazard of the product?

21 A No.

22 Q Okay. You said "in the public's mind."  
23 So was the public informed that the paper had -- was  
24 changed?

25 A No.

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1 Q Paper has a certain porosity, and as a  
2 puff is taken on the cigarette a certain amount of  
3 air is drawn through the paper and not through the  
4 growing coal -- excuse me.

5 Okay. And do you -- is it your testimony  
6 that the public or the consumers believed that the  
7 change in paper made the product safer?

8 A I'm not sure that the public would be  
9 aware of it.

10 Q Okay. I understand that. But why did the  
11 designers at Brown & Williamson make the paper or  
12 change the paper so it burned faster? What was the  
13 intent of their -- or their goal in doing this?

14 A Well, by this time there were periodic  
15 reports being made in the "Reader's Digest" of the  
16 amount of tar and nicotine in the various brands  
17 and --

18 Q Okay.

19           A     And there was an attempt to reduce the  
20     amount of tar and nicotine that was -- that was  
21     constituted in condensed smoke.

22           Q     Okay. So the increasing rate of the  
23     burning paper had the effect of reducing the tar and  
24     nicotine in the inhaled smoke?

25           A     Yes.

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1           Q     Doctor, you testified earlier today that  
2     you attended the meeting of the tobacco company  
3     executives in late 1953 after publications came to  
4     your attention regarding the possible relationship  
5     between smoking and health issues; is that correct?

6           A     Yes.

7           Q     And that meeting resulted, Doctor, in the  
8     formation of the Tobacco Industry Research  
9     Committee, did it not?

10          A     Yes.

11          Q     Now, the tobacco industry funded the  
12     Tobacco Industry Research Committee, did it not?

13          A     Yes.

14          Q     And it funded that committee to conduct  
15     research on smoking and health issues, did it not?

16          A     Yes.

17          Q     Was Brown & Williamson one of the  
18     companies that funded research by the TIRC?

19          A     Yes.

20          Q     Was Phillip Morris one of the companies  
21     that funded research by the TIRC?

22 A Yes.

23 Q Was the American Tobacco Company one of  
24 the companies that funded that research?

25 A Yes.

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1 Q Was P. Lorillard one of the companies that  
2 funded that research?

3 A Yes.

4 Q Was Reynolds one of the companies that  
5 funded that research?

6 A Yes.

7 Q Was it the intention, Doctor, of the  
8 founders of the TIRC that research would be  
9 conducted by eminent independent researchers?

10 A Yes.

11 Q Isn't that correct, that they would  
12 conduct their research in well-equipped  
13 laboratories?

14 A Yes.

15 Q Wasn't it the intention of the founders of  
16 the TIRC that research would be conducted on a wide  
17 variety of issues?

18 A Yes.

19 Q And was the research to cover a variety of  
20 subjects?

21 A Yes, but focused primarily on cancer.

22 Q Were the researchers, Doctor, to have a  
23 variety of different kinds of expertise?

24 A Yes.

25 Q Can you describe that in more detail for

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1 us?

2 A Only wanted medical capability,  
3 competence, and only scientific competence --

4 Q Uh-huh (affirmative).

5 A -- chemistry, physics or statistics.

6 Q And were the researchers conducted with  
7 outside academic and medical institutions?

8 A Yes.

9 Q What kinds of institutions were these  
10 researchers conducted with -- connected with?

11 A Universities and institutes.

12 Q Can you remember any of the names of the  
13 universities?

14 A No, I can't.

15 Q Well, do you recall the name Harvard  
16 University?

17 A Yes.

18 Q Do you recall the name of any of the  
19 academic institutions?

20 A I think University of California.

21 Q Yes, sir. Would it be fair to say,  
22 Doctor, that there was also similarly credentialed  
23 universities in the United States?

24 A Yes.

25 Q Were the researchers people who had

1 associations with these institutions?

2 A Yes.

3 Q And they maintained those relationships  
4 with the institutions during the course of their  
5 research --

6 A Yes.

7 Q -- for the TIRC?

8 Doctor, I think you already -- you also  
9 testified about the Scientific Advisory Board?

10 A Yes.

11 Q And the role that you played in the  
12 selection of the Scientific Advisory Board.

13 What were the reputations generally of the  
14 people that were selected to serve on the Scientific  
15 Advisory Board?

16 A Well, they were highly qualified and well  
17 recognized in their professions.

18 Q Did they also maintain relationships with  
19 the scientific and educational institutions?

20 A Yes.

21 Q Can you give us any examples?

22 A Well, Clarence Cook Little, who was  
23 associated with Roscoe Jackson Laboratory in Maine.

24 Q And I think you also testified earlier,  
25 Doctor, that he had been the president of a major

1 American university?

2 A Yes.

3 Q Do you recall which University he had been  
4 the president of?

5 A I think one of the universities of  
6 Michigan.

7 Q All right. Tell us something about the  
8 expertise of the individuals who served on the  
9 Scientific Advisory Board.

10 A Well, Clarence Cook Little had been  
11 president, I think, of the American Cancer Society,  
12 cancer research.

13 Q And were there other people who served on  
14 the scientific advisory board who had similar levels  
15 of expertise?

16 A Yes.

17 Q Did the members who served on the  
18 Scientific Advisory Board also come from a variety  
19 of different academic disciplines?

20 A Yes.

21 Q Did that include medical doctors?

22 A Yes.

23 Q Did it include statisticians?

24 A Yes.

25 Q Do you recall a Dr. Wilson from Harvard

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1 University?

2 A Yes.

3 Q What do you know about him?

4 A Well, he was highly regarded in the field  
5 of statistics.

6 Q Was he an epidemiologist?

7 A I'm not sure.

8 Q All right. Now, did Brown & Williamson  
9 fund research into the relationship between smoking  
10 and health which was funded through and approved by  
11 the Scientific Advisory Board of the TIRC?

12 A Yes.

13 Q So it's true, is it not, Doctor, that  
14 through the TIRC Brown & Williamson funded a great  
15 variety of researches into these important questions  
16 of smoking and health?

17 A Yes.

18 Q All right. Now, Doctor, I think you  
19 testified that the fact that people smoke and don't  
20 get cancer is evidence in your mind that smoking  
21 does not cause cancer; is that correct?

22 A Yes, it is.

23 Q Do you have any idea of the number of  
24 people -- and you're thinking about your own  
25 thoughts about this issue -- how many people smoke

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1 who don't get cancer?

2 A Well, it -- about ten years ago it was 70  
3 million.

4 Q 70 million people?



5 A Yes.

6 Q Did that fact that 70 million smoked and  
7 don't get cancer influence your thinking on this  
8 issue?

9 A Yes.

10 Q That you testified about earlier today.  
11 Okay. Doctor, I think you also testified  
12 that during the period of your time that you were  
13 employed with Brown & Williamson that  
14 Brown & Williamson did not publish nicotine values  
15 on the packages of cigarettes that it sold?

16 A No.

17 Q Do you know whether Brown & Williamson was  
18 attempting to defraud anybody by not putting those  
19 values on their cigarette packs?

20 A No.

21 Q Sir?

22 A No, they did not want to defraud anyone.

23 Q I think you also testified that Brown &  
24 Williamson did not publish tar values on the packs  
25 of cigarettes they sold at the time you were

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1 employed by Brown & Williamson?

2 A No, they didn't.

3 Q Is that right?

4 In not doing so, sir, did they attempt to  
5 defraud anybody in your view?

6 A No, they didn't.

7 Q Doctor, you also testified that during the

8 course of the employment that you had with Brown &  
9 Williamson there was no publication of all of the  
10 ingredients on the sides of packs of the cigarettes  
11 sold by Brown & Williamson?

12 A No.

13 Q Is that correct?

14 When Brown & Williamson did that, sir, to  
15 the best of your knowledge and belief, was Brown &  
16 Williamson trying to defraud anybody?

17 A No.

18 Q Did you ever, Doctor, knowingly put an  
19 ingredient or cause to be put an ingredient in a  
20 Brown & Williamson cigarette which you believe would  
21 be harmful to a member of the American public?

22 A No, I didn't.

23 Q Okay. Are you a doctor, an  
24 epidemiologist?

25 A No.

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1 Q Are you a statistician?

2 A No?

3 Q You an M.D.?

4 A No.

5 Q Have you ever personally performed smoking  
6 and health research?

7 A No.

8 Q Doctor, earlier you testified about the  
9 Industry Technical Committee, the ITC?

10 A Yes.

11 Q And you testified that you, as a member of  
12 the ITC, provided information to the Scientific  
13 Advisory Board about cigarettes; is that correct?

14 A Yes.

15 Q And that was about the construction of  
16 cigarettes?

17 A Yes.

18 Q Did you in providing this information  
19 include specific ingredient information of Brown &  
20 Williamson Tobacco Corporation?

21 A No, I did not.

22 Q Did that include specific information of  
23 Phillip Morris?

24 A No.

25 Q Did it include specific ingredient

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1 information of Reynolds?

2 A No.

3 Q Did that include specific ingredient  
4 information of P. Lorillard?

5 A No.

6 Q Did that include specific ingredient  
7 information of the American Tobacco Company?

8 A No.

9 Q Did you provide any specific formulas of  
10 the Brown and Williamson Tobacco Corporation to the  
11 Scientific Advisory Board?

12 A No, I didn't.

13 Q Did you provide any such information  
14 relating to Phillip Morris?  
15 A No.  
16 Q American Tobacco?  
17 A No.  
18 Q P. Lorillard?  
19 A No.  
20 Q Any other tobacco company?  
21 A None.  
22 Q Did you provide any other information that  
23 you considered to be a trade secret to the  
24 Scientific Advisory Board?  
25 A No, I didn't.

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1 Q Did you provide any such information to  
2 anybody else at the CTR?  
3 A No.  
4 Q When you provided this information  
5 regarding the construction of cigarettes then, what  
6 was the general nature of that information?  
7 A Just that they be cognizant of the general  
8 nature of additives applied and the purpose for  
9 them.  
10 Q I see. Without any specifics?  
11 A No.  
12 Q Mr. Tucker, you understand that you're  
13 still under oath, sir?  
14 A Yes, I do.

15 Q And you understand the nature of that  
16 oath?  
17 A Yes.  
18 Q On cross-examination you discussed a  
19 meeting that took place at the Plaza Hotel in 1953.  
20 Do you recall that testimony?  
21 A Yes, I do.  
22 Q I want to review with you and make sure  
23 who was present at the meeting. I think you already  
24 told us that you were at the meeting; is that  
25 correct?

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1 A Yes.  
2 Q And was -- I think you may have already  
3 told us that Mr. Hartmett, the president of Brown &  
4 Williamson, was at the meeting?  
5 A Yes.  
6 Q Was Paul Hahn, the president of American  
7 Tobacco Company, at the meeting?  
8 A Yes, he was.  
9 Q And was a Mr. Hamner, director of research  
10 of American Tobacco Company, at the meeting?  
11 A Yes.  
12 Q What was Mr. Hamner's first name?  
13 A Hiram.  
14 Q Did the president of Phillip Morris attend  
15 the meeting?  
16 A My recollection of that is a little hazy.  
17 Q Do you recall testifying previously that

18 he attended the meeting?

19 A Yes, I thought.

20 Q Do you think he was there or not, sir?

21 A Yes.

22 Q And do you remember his name?

23 A Hugh Coleman.

24 Q Was Robert DuPuis, the director of

25 research of Phillip Morris, in attendance at the

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1 meeting?

2 A Yes.

3 Q Did president of R. J. Reynolds also

4 attend the meeting?

5 A Yes.

6 Q Do you recall his name?

7 A No.

8 Q Do you recall whether or not a research  
9 director from R. J. Reynolds attended this meeting?

10 A I'm not sure he was research director, but  
11 he represented the technical.

12 Q Did the president of Lorillard Tobacco  
13 attend the meeting?

14 A Yes.

15 Q And did Hugh Parmelee, the research  
16 director of Lorillard, attend the meeting?

17 A Yes.

18 Q At the time the meeting took place, if I  
19 recall correctly, it was December of 1953, correct?

20 A Yes.

21 Q And at the time the meeting took place,  
22 were the presidents aware of Dr. Wynder's research  
23 which had been published concerning the cigarettes  
24 and lung cancer?

25 A Yes.

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1 Q And you personally read Dr. Wynder's  
2 studies?

3 A Yes.

4 Q Do you recall having read a study  
5 published in the journal of the American Medical  
6 Association entitled "Tobacco Smoking as a Possible  
7 Etiological Factor in Bronchiogenic Carcinoma"  
8 published by Dr. Wynder in 1950?

9 A Yes.

10 Q Do you recall the following statement  
11 being made in that paper by Dr. Wynder: Quote, "The  
12 suggestion that smoking, and in particular cigarette  
13 smoking, may be important in the production of  
14 bronchogenic carcinoma has been made by many writers  
15 on the subject, even though well-controlled and  
16 large scaled clinical studies are lacking."

17 Do you recall that?

18 A If it was in that article, I did at the  
19 time.

20 Q Do you recall these conclusions by  
21 Dr. Wynder after he set forth his study in that  
22 article: Quote, "Excessive and prolonged use of

23 tobacco, especially cigarettes, seems to be an  
24 important factor in the induction of bronchogenic  
25 carcinoma."

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1           You may answer, Doctor. Do you recall  
2 that statement being made?

3           A     What statement?

4           Q     The following statement: "Excessive and  
5 prolonged use of tobacco, especially cigarettes,  
6 seems to be an important factor in the induction of  
7 bronchogenic carcinoma"?

8           A     Yes.

9           Q     Do you recall the following conclusion  
10 also being made by Dr. Wynder: Quote, "Among 605  
11 men with bronchogenic carcinoma, other than  
12 adenocarcinoma, 96.5 percent were moderately heavy  
13 to chain smokers for many years."

14           Do you recall that statement being made in  
15 the article?

16           A     Yes.

17           Q     Sir, was the purpose of the 1953 meeting  
18 to formulate a joint industry response to the  
19 medical research that had found that cigarette  
20 smoking was an important factor in the development  
21 of lung cancer?

22           A     I didn't understand that question.

23           Q     Let me rephrase it.

24           Again, I'm talking about the meeting that



25 took place at the Plaza Hotel in New York in 1953.

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1 Was the purpose of that meeting to formulate a joint  
2 industry response to the medical research that had  
3 found that cigarette smoking was an important factor  
4 in the development of lung cancer?

5 A Yes, it was.

6 Q How long did that meeting last, sir?

7 A Two days.

8 Q Did the presidents who were in attendance  
9 at that meeting discuss various actions the industry  
10 could take in response to the medical research which  
11 had been published?

12 A Yes.

13 Q Were any of the researchers who had  
14 published the ten studies referenced by Dr. Wynder  
15 in his 1953 article, were any of those researchers  
16 invited to the meeting at the Plaza Hotel in New  
17 York in 1953?

18 A Not to my knowledge.

19 Q Were any of the doctors in attendance at  
20 that meeting?

21 A Are you speaking of M.D.s?

22 Q Yes, sir, medical doctors.

23 A No.

24 Q Were any statisticians present at the  
25 meeting?

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1 A No.

2 Q Were any epidemiologists present at the  
3 meeting?

4 A No.

5 Q Sir, in 1953 were you aware of any  
6 published research which had not found that  
7 cigarette smoking did not cause lung cancer?

8 A No.

9 Q Did anyone at the meeting at the Plaza  
10 Hotel in 1953 claim that there was published  
11 research that showed that cigarettes did not cause  
12 lung cancer?

13 A Not to my knowledge.

14 Q Did they take any action whatsoever at the  
15 1953 meeting to ensure that cigarettes they  
16 manufactured were not provided or sold to minors?

17 A No.

18 Q Did they even discuss the potential health  
19 consequences to children who might use their pro- --  
20 cigarettes?

21 A No.

22 Q At the meeting in 1953 did the presidents  
23 take action to create the Tobacco research --  
24 Industry Research Committee?

25 A I don't follow the question.

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1 Q Okay. Let me ask it this way: At the  
2 meeting at the hotel, the Plaza Hotel in 1953, did  
3 the presidents create what became known as the  
4 Tobacco Industry Research Committee?

5 A Yes.

6 Q Did the TIRC utilize the public relations  
7 firm of Hill & Knowlton?

8 A Yes.

9 Q Now, sir, you served as a chairman of what  
10 was known as the ITC, correct?

11 A Yes.

12 Q The ITC was the Industry Technical  
13 Committee; am I correct?

14 A Yes.

15 Q And back in 1954 you were personally  
16 involved in interviewing doctors to determine if  
17 they were appropriate for service on what became  
18 known as the SAB; am I correct?

19 A Yes.

20 Q And the SAB was the Scientific Advisory  
21 Board; is that correct?

22 A Yes.

23 Q And the Scientific Advisory Board was  
24 created by the presidents at the meeting in 1953 at  
25 the Plaza Hotel, correct?

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1 A Yes.

2 Q Did you ever contact Dr. Wynder about  
3 serving on the SAB?

4           A     No.

5           Q     Why not?

6           A     Wynder had already committed himself.

7           Q     Because he had done research on the

8     relationship between cigarette smoking and lung

9     cancer?

10          A     Well, because he -- his pronouncements.

11          Q     In reviewing his work, did you believe

12     that he was knowledgeable concerning the subject of

13     any association between cigarette smoking and lung

14     cancer?

15          A     No.

16          Q     You did not believe that he was not

17     knowledgable on the subject matter?

18          A     No.

19          Q     Did you contact Richard Doll concerning

20     whether or not he would be willing to serve on the

21     SAB?

22          A     No.

23          Q     And why didn't you contact Dr. Doll?

24          A     He was far away.

25          Q     Did you ask him whether or not he would be

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1     willing to travel to take care of whatever duties he

2     might have at the SAB?

3          A     No.

4          Q     Was he qualified to serve on the SAB?

5          A     I would think so, yes.

6 Q Did you contact Dr. Alton Ochsner  
7 concerning whether or not he would be willing to  
8 serve on the SAB?

9 A No.

10 Q And why didn't you contact Dr. Ochsner?

11 A He had already stated his position.

12 Q Do you believe that Dr. Ochsner was  
13 knowledgeable in the area of whether or not  
14 cigarette smoking was associated with lung cancer?

15 A Yes.

16 Q Did you contact Dr. Hammond to determine  
17 whether he would be willing to serve on the SAB?

18 A Doctor who?

19 MR. RILEY: Your Honor, I'm sorry to  
20 interrupt. Can I just get a page number?

21 MS. HARTLEY: 37.

22 MR. RILEY: Thank you.

23 Q You're familiar with Dr. Hammond's work,  
24 aren't you, sir?

25 A Tyler Hammond?

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1 Q Yes.

2 A No.

3 Q Why didn't you contact Dr. Hammond?

4 A I don't recall.

5 Q Let me go back to the time that you  
6 were -- that you attended the 1953 meeting where the  
7 TIRC was initiated.

8 MR. RILEY: Your Honor, can I interrupt

9 for a second?

10 THE COURT: Do you want to approach the  
11 side bar?

12 MR. RILEY: Yes, Judge.

13 (Side bar, Court and counsel)

14 THE COURT: Ladies and gentlemen, I'm  
15 going to ask you to step back in the jury room for  
16 about five minutes. We'll bring you right back  
17 out. All right. We'll take about a five-minute  
18 recess. They're going to compare depositions.  
19 (Jury exits the courtroom)  
20 (Short recess)

21 THE COURT: Do you think you have it  
22 straightened out?

23 MS. HARTLEY: Yes, Your Honor.

24 THE COURT: All right. As soon as the  
25 clerk comes back, we'll start again.

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1 Are you ready to proceed, Mr. Riley?

2 MR. RILEY: Yes, Your Honor.

3 THE COURT: Was the problem a  
4 misunderstanding about what was out or in?

5 MS. HARTLEY: I think because Dean and I  
6 had done the designations this was an area that --  
7 it was late last night, as Your Honor knows, when we  
8 were doing it and Tom and I had not coordinated it.

9 MR. RILEY: We're all set.

10 THE COURT: All right. We need the

11 clerk. I guess we can go ahead and start without  
12 the clerk. That's not a problem, if you're ready to  
13 proceed.

14 MS. HARTLEY: We're ready, Your Honor.

15 THE COURT: All right.

16 Mr. Nyhan?

17 MR. NYHAN: We're ready, Your Honor.

18 THE COURT: Bring them in, Mr. Backer.

19 And the clerk, he can come and go as he pleases,  
20 so....

21 All right. Ms. Hartley, you may proceed  
22 whenever you're ready.

23 MS. HARTLEY: May it please the Court.

24 Q Dr. Tucker, what was your knowledge on the  
25 hazards of Brown & Williamson cigarettes at the time

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1 you attended the meeting in 1953?

2 A I didn't consider them hazardous.

3 Q Okay. Were you aware of whether or not  
4 carcinogens had been identified in the smoke of  
5 cigarettes as of this 1953 meeting?

6 A No, they had not been.

7 Q When was the first time Brown & Williamson  
8 laboratory identified carcinogens in cigarette  
9 smoke?

10 A Never did, to my knowledge.

11 Q Now, was the existence of carcinogens in  
12 tobacco smoke of interest to the scientific people  
13 on the TIRC?

14 A Yes.

15 Q Was it of interest to you in 1953 whether,  
16 in fact, there were carcinogens in tobacco smoke?

17 A Yes.

18 Q What research did you conduct to ascertain  
19 whether there were carcinogens in tobacco smoke as  
20 of 1953?

21 A I done none.

22 Q Is it true that in 1953 you represented  
23 the knowledge available or obtained by the Brown &  
24 Williamson Tobacco Company?

25 A Yes.

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1 Q Dr. Tucker, let me ask you, sir, do you  
2 know what a polynuclear aromatic compound is?

3 A Yes.

4 Q And did you as a chemist, working for  
5 Brown & Williamson, do research on polynuclear  
6 aromatic compounds?

7 A I did it prior to being at Brown &  
8 Williamson.

9 Q All right. Did you do any while you were  
10 at Brown & Williamson?

11 A No.

12 Q All right. Do you know some examples of  
13 polynuclear aromatic compounds?

14 A Yes, diphenyl and triphenyl.

15 Q Diphenyl and triphenyl?



16 A Yes.

17 Q Do you know what a benzopyrene is?

18 A Yes.

19 Q Also known as BAP?

20 A Yes.

21 Q Did you, while you were at Liggett, do

22 research into benzopyrene content of cigarette

23 smoke?

24 A No.

25 Q Did you do it while you were at Brown &

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1 Williamson?

2 A No.

3 Q Did you do it while you were in the

4 Technical Committee advising the TIRC?

5 A No.

6 Q Did you have access, while you were in the

7 Technical Committee advising the TIRC, of whether

8 any information that provided or suggested that

9 benzopyrene was a carcinogen found in cigarette

10 smoke?

11 A No, I didn't.

12 Q What are the pyrolytic products of

13 tobacco? Do you know what the word means,

14 pyrolytic?

15 A Yes.

16 Q Yes.

17 Mean -- means formed in the burning of

18 tobacco, correct?

19 A Yes.

20 Q Did you, while you were at Brown &  
21 Williamson, inspect the pyrolytic compounds of  
22 tobacco?

23 A No.

24 Q As of 1953 were you aware of any source of  
25 whether benzopyrene and n-benzopyrene had been

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1 identified in the distillate cigarette smoke -- of  
2 tobacco smoke?

3 A No.

4 Q Do I fairly understand that you are of the  
5 belief that such compounds had not been identified  
6 in the distillate of tobacco smoke?

7 A Yes, that's correct.

8 Q Did you know whether or not the compounds,  
9 benzopyrene and n-benzopyrene, were carcinogens,  
10 whether or not they had been identified in cigarette  
11 smoke?

12 A Yes, I had known them to be carcinogenic.

13 Q And would it have been important to you to  
14 know in 1953, when the meeting occurred at the Plaza  
15 Hotel, whether or not carcinogenic compounds had  
16 been identified in cigarette smoke?

17 A Yes.

18 Q Now, you were asked by attorneys for  
19 Brown & Williamson whether you, by virtue of being  
20 an advisor to the TIRC, set in motion a method by

21    which scientists would be doing research on  
22    cigarette-related issues.  Is that a fair statement?  
23           A     Yes.  
24           Q     And we previously talked about your  
25    efforts and your committee's efforts to select a

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1    director, a scientific director, for the Scientific  
2    Advisory Board of the TIRC?  
3           A     Yes.  
4           Q     Did you have any -- do you personally have  
5    any -- have any involvement in the selection of the  
6    Scientific Advisory Board members?  
7           A     Yes.  
8           Q     And was one of the members of the TIRC  
9    Dr. Paul Cotin?  
10          A     Yes.  
11          Q     Did you know Dr. Cotin?  
12          A     Yes.  
13          Q     And did you understand Dr. Cotin to be an  
14    eminent and respected scientist?  
15          A     Yes.  
16          Q     What was Dr. Cotin's responsibility as a  
17    member of the Scientific Advisory Board?  
18          A     The same as all the other members.  
19          Q     Which was?  
20          A     To select and recommend the support of  
21    research proposals.  
22          Q     And did some of those research proposals  
23    also involve people who were themselves members of

24 the Scientific Advisory Board?

25 A It might well have.

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1 Q Can you point to any specific tests or  
2 recommendations that came from the Scientific  
3 Advisory Board that affected the design of Brown &  
4 Williamson products?

5 A No.

6 Q Were you aware of whether Dr. Cotin  
7 published a paper in the 1950s that stated  
8 "cigarettes cause cancer"?

9 A No.

10 Q Did you make it a point to read the  
11 publications of the people on the Scientific  
12 Advisory Board when they published on the issue of  
13 cigarettes and disease?

14 A No.

15 (Change of reporter, 10:25 a.m.)

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1           Q     I have a few copies of this one. Let me  
2 hand you a periodical publication entitled "The Role  
3 and Action of Environmental Agents in the  
4 Pathogenesis of Lung Cancer II Cigarette Smoke" by  
5 Paul Cotin, M.D. and Hans L. Falk. Do you see that?

6           A     Yes. It says Hans Falk, Ph.D.

7           Q     Let me direct your attention to page 257  
8 under the first paragraph beginning comment. Let me  
9 read you the statement and then ask whether you  
10 agree or disagree. Under comment, the first  
11 paragraph, the statement is made by Dr. Cotin,  
12 member of the Scientific Advisory Board of TIRC,  
13 quote, The statement recently made by a study group  
14 appointed to examine the scientific evidence of the  
15 effects on tobacco smoking on health to the effect  
16 that, quote, the sum total of scientific evidence  
17 establishes beyond a reasonable doubt that cigarette  
18 smoking is a causative factor in the rapidly  
19 increasing incidence of human epidermoid carcinoma  
20 of the lung, end quote, representing more or less  
21 universally accepted viewpoint with which we  
22 concur.

23                   Do you see that, Bennett?

24           A     Yes, I see it.

25           Q     Did Dr. Cotin ever address the TIRC in

1 your presence and state these words or words to that  
2 effect that he concurred with the pronouncement of  
3 the Medical Research Council of Great Britain to the  
4 effect that cigarette smoking was a causative factor  
5 in cancer of the lung? Doctor, I'm only asking you  
6 whether Dr. Cotin ever addressed the Scientific  
7 Advisory Board in your presence?

8 A No.

9 Q All right, and did you ever ask Dr. Cotin  
10 what his views were on whether cigarettes caused  
11 cancer?

12 A No.

13 Q All right. Did the views of Dr. Cotin,  
14 were they given to the public through any  
15 pronouncement of TIRC to your knowledge?

16 A No.

17 Q His statement let me represent to you  
18 appeared in a publication which was received for  
19 publication May 15, 1959, published sometime in  
20 1960. Now, you were at Brown & Williamson as of  
21 May 15th, 1959, right?

22 A Yes.

23 Q Did Brown & Williamson ever tell anybody  
24 that Dr. Cotin believed that cigarettes caused  
25 cancer?

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1 A Not to my knowledge.

2 Q Do you know whether Brown & Williamson  
3 ever invited Dr. Cotin to the offices of Brown &  
4 Williamson while you were there?

5 A No.

6 Q Were you aware that Dr. Cotin was  
7 preparing this manuscript which he submitted on  
8 May 15, 1959?

9 A No.

10 Q So the TIRC funded research on cigarettes  
11 and disease, correct?

12 A Yes.

13 Q And the TIRC paid Dr. Cotin to be on the  
14 Scientific Advisory Board, right?

15 A Yes.

16 Q And Dr. Cotin was held out to the world by  
17 the TIRC as an eminent and respected scientist who  
18 examined the question of whether cigarettes caused  
19 cancer, right?

20 A Yes.

21 Q Okay. And then when Dr. Cotin did his  
22 research and found out and published that cigarettes  
23 caused cancer did TIRC or the cigarette industry or  
24 Brown & Williamson tell the public?

25 A Not to my knowledge.

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1 Q Dr. Tucker, could you tell us when you  
2 were employed by Brown & Williamson, what years?

3 A From 1953 until 1959.

4 Q After 1959 were you ever employed by Brown

5     & Williamson?

6           A     No.

7           Q     In your capacity as research director at  
8     Brown & Williamson beginning in 1953 tell us what  
9     types of research Brown & Williamson conducted  
10    internally?

11          A     We analyzed tobacco in the processing of  
12    tobacco through its various stages en route to being  
13    made into cigarettes.

14          Q     Did Brown & Williamson conduct in-house  
15    research during your tenure relating to smoking and  
16    health?

17          A     No, it did not.

18          Q     Was Brown & Williamson during your tenure  
19    equipped to do biological research?

20          A     No, it was not.

21          Q     Let me ask you this, Doctor, did any of  
22    the in-house lawyers at Brown & Williamson ever  
23    attempt to influence the research results from your  
24    department?

25          A     No, they did not.

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1          Q     Did any lawyer at Brown & Williamson ever  
2    tell you or suggest that you should destroy any  
3    research results?

4          A     No, they did not.

5          Q     Dr. Tucker, I'd like to direct your  
6    attention back to the early 1950's. Do you recall



7 during the early '50s that some results of research  
8 regarding mouse skin painting appeared in the  
9 literature?

10 A Yes, I do.

11 Q Can you tell us generally what those  
12 studies were about.

13 A They condensed tobacco smoke and applied  
14 that condensed smoke to the backs of mice so they  
15 were shaved.

16 Q And do you recall whether these results of  
17 these studies in the early '50s were widely  
18 publicized?

19 A Yes, they were widely recognized.

20 Q All right, Doctor, let me take you back  
21 again to the early 1950's, including 1953 when you  
22 went to work for Brown & Williamson. At that time  
23 did you personally hold the opinion that smoking  
24 caused lung cancer?

25 A No, I did not.

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1 Q Who was the president of Brown &  
2 Williamson at the time?

3 A His name was Timothy Hartmett.

4 Q Did Mr. Hartmett ever tell you that he  
5 thought smoking caused lung cancer?

6 A No, he did not.

7 Q Doctor, in the aftermath of the  
8 publications of these studies involving mouse skin  
9 painting, was there an industry meeting scheduled

10 involving Brown & Williamson and other cigarette  
11 manufacturers?  
12 A Yes, there was.  
13 Q Who called that meeting?  
14 A It was Paul Hahn.  
15 Q Who was Mr. Hahn?  
16 A He was president of the American Tobacco  
17 Company.  
18 Q Is that the meeting which led to the  
19 formation of the Tobacco Industry Research Council?  
20 A Yes, it was.  
21 Q And is the Tobacco Industry Research  
22 Council also referred to as the TIRC?  
23 A Yes.  
24 Q When was that meeting scheduled for,  
25 Dr. Tucker?

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1 A I believe it was December of 1953.  
2 Q Who were the participants in that meeting?  
3 A Timothy Hartmett, Brown & Williamson,  
4 American Tobacco Company, Reynolds Tobacco and  
5 Philip Morris and Lorillard Tobacco Company.  
6 Q Where did that meeting take place?  
7 A In the Plaza Hotel in New York.  
8 Q Can you tell us the purpose of that  
9 meeting, please, sir?  
10 A It was to discuss the charges being  
11 leveled against smoking and to organize some kind of

12 joint response to it.

13 Q And did you attend the meeting yourself?

14 A Yes, I did.

15 Q Did Hartmett attend the meeting?

16 A Yes, he did.

17 Q Did any lawyers from Brown & Williamson

18 attend that meeting?

19 A No, they did not.

20 Q Do you recall any lawyers from any company

21 being present at the meeting?

22 A No, I do not.

23 Q Dr. Tucker, do you recall whether anyone

24 from the United States Government was invited to

25 attend the meeting at the Plaza Hotel?

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1 A It was my understanding that an invitation

2 was given to them to attend.

3 Q Was that from the U.S. Department of

4 Justice?

5 A It would have been, yes.

6 Q Do you recall why the industry issued an

7 invitation to the U.S. Department of Justice to

8 attend this meeting at the Plaza Hotel?

9 A Well, in 1910 the U.S. Government

10 restrained the industry from joining forces.

11 Q All right. Now, do you recall whether or

12 not an official from the Justice Department actually

13 attended the Plaza Hotel meeting?

14 A No, he did not.

15 Q Do you know why the invitation was not  
16 accepted by the Justice Department?

17 A No, I do not.

18 Q Doctor, during the meeting at the Plaza  
19 Hotel did any of the representatives of the tobacco  
20 companies express a view that they believed smoking  
21 caused cancer?

22 A No, they did not.

23 Q Did any of the technical and research  
24 directors who were present at the meeting express a  
25 view that they believed smoking caused cancer?

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1 A No, they did not.

2 Q Doctor, again, did this meeting result in  
3 the formation of the TIRC?

4 A Yes, it did.

5 Q And, Doctor, were the companies, the  
6 tobacco companies, were they the members of the  
7 TIRC?

8 A Yes, they were.

9 Q Can you tell us the purpose of the  
10 formation of the TIRC?

11 A It was in response to these charges being  
12 leveled against smoking in relation to health.

13 Q Now, Doctor, did the TIRC itself ever  
14 conduct scientific research?

15 A No, not to my knowledge.

16 Q Did the TIRC ever fund research to be

17 performed by others?

18 A Yes, it did.

19 Q And who would conduct the research that  
20 was to be funded through the TIRC?

21 A There would be various applicants through  
22 the universities or research organizations with  
23 facilities and personnel adequate to carry out the  
24 research.

25 Q Doctor, if you know, can you tell us why

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1 the Tobacco Industry Research Committee decided to  
2 fund outside researchers rather than have the TIRC  
3 or the company scientists do it themselves?

4 A Yes, it was felt that any work performed  
5 by the industry itself would be suspect.

6 Q All right, and, Doctor, how did the TIRC  
7 decide what outside research proposal should be  
8 funded?

9 A Well, they proposed a formation of a  
10 Scientific Advisory Board. They were largely  
11 medical scientists who would receive these  
12 applications and review them and make their  
13 recommendation.

14 Q Now, did the Scientific Advisory Board  
15 include medical doctors?

16 A Yes, it did.

17 Q Statisticians?

18 A Yes.

19 Q And scientists in other areas as well?

20 A Yes.

21 Q Doctor, do you recall the names of any of  
22 the members of the Scientific Advisory Board?

23 A Well, the head of it was Dr. Clarence Cook  
24 Little.

25 Q Now, Doctor, is it correct that he had

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1 been president of the University of Michigan and the  
2 University of Maine?

3 A Yes.

4 Q Do you know what his reputation was as a  
5 scientist in the scientific community?

6 A Yes, he was highly regarded.

7 Q Now, was there a Dr. Paul Cotin on the  
8 Scientific Advisory Board?

9 A Yes, there was.

10 Q Do you recall where he was from?

11 A From Southern California.

12 Q Was there a Dr. Wilson on the Scientific  
13 Advisory Board?

14 A Yes.

15 Q Do you recall what university he was from?

16 A I think he was from Harvard. He was a  
17 statistician.

18 Q And are you aware of his reputation in the  
19 scientific community?

20 A Yes, I believe he was highly regarded.

21 Q Doctor, let me ask you this question:

22 Were the outside researchers funded through the  
23 Scientific Advisory Board free to conduct their  
24 research as they saw fit?

25 A Yes, they were.

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1 Q Doctor, was it your understanding that the  
2 grant supported by the TIRC through SAB would fund  
3 only research favorable to the tobacco industry?

4 A No.

5 Q Well, what was your understanding in that  
6 regard?

7 A They would fund any research that bore on  
8 the question of smoking and health.

9 Q Doctor, did you ever attempt to influence  
10 the result of the research funded by the TIRC?

11 A No, I didn't.

12 Q To your knowledge, did any of the members  
13 of TIRC ever attempt to influence the results of the  
14 research funded through the TIRC?

15 A Not to my knowledge.

16 Q And, Doctor, would that include -- well,  
17 let me ask you this more specifically: To your  
18 knowledge, did any other scientist, executive or  
19 lawyer from the cigarette companies ever attempt to  
20 influence the result of TIRC-funded research?

21 A Not to my knowledge.

22 Q Doctor, let me take you back to the hotel  
23 meeting for a minute. In addition to making the  
24 decision to fund research was there a discussion at

25 that meeting about retaining a public relations

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1 specialist?

2 A Yes, there was.

3 Q And, in fact, was there a representative  
4 of the public relations firm of Hill & Knowlton  
5 present at the meeting?

6 A Yes.

7 Q Doctor, from your attendance at the Plaza  
8 Hotel meeting did you understand that Hill &  
9 Knowlton was to publish accurate and truthful  
10 information to the American public?

11 A Yes, it was.

12 Q To your knowledge, did anything that Hill  
13 & Knowlton did interfere in any way with the  
14 research evaluated by the Scientific Advisory Board?

15 A No.

16 Q Doctor, how would you describe the freedom  
17 that the SAB had in this regard to their funding  
18 decisions?

19 A They were totally free to fund or not  
20 fund.

21 Q All right, Doctor, I'd like to turn your  
22 attention now to a group called the Industry  
23 Technical Committee, all right?

24 A Yes.

25 Q Were you a member of a group called the

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1 Industry Technical Committee?

2 A Yes, I was.

3 Q Now, was one of the roles of the Industry  
4 Technical Committee to select the members of the  
5 Scientific Advisory Board?

6 A Or to make recommendations relative to it.

7 Q All right. Was another role of the  
8 Industry Technical Committee to provide data or  
9 technical information about the manufacturing  
10 processes to the members of the SAB?

11 A Yes, it was.

12 Q By the way, Doctor, did you or any  
13 representative of the tobacco company ever conduct  
14 any scientific research yourselves through the TIRC?

15 A No, we did not.

16 Q Now, let's talk about your role in the  
17 selection or recommendation of SAB members. What  
18 guidelines did you employ when you made  
19 recommendations for members of the SAB?

20 A We looked for people who had academic  
21 accomplishments and were highly regarded in the  
22 scientific community.

23 Q Was integrity an issue that you looked at?

24 A Yes.

25 Q As far as you were concerned, was their

1 smoking status a factor in their selection?

2 A No, it was not.

3 Q Now, Doctor, is it correct or can you tell  
4 us, did you in fact invite researchers from the  
5 National Cancer Institute to become members of the  
6 SAB?

7 A Yes, we did.

8 Q And did they accept?

9 A No, they did not.

10 Q To your knowledge. Did anyone from the  
11 firm of Hill & Knowlton ever attempt to influence  
12 the type of research or research results that the  
13 Scientific Advisory Board through the TIRC funded?

14 A Not to my knowledge.

15 Q To your knowledge, Doctor, did anyone from  
16 Brown & Williamson, Reynolds or any other tobacco  
17 company ever attempt to influence the type of  
18 research or research results that the TIRC through  
19 the SAB funded?

20 A No.

21 Q Doctor, in the last session of your  
22 deposition some weeks ago you indicated that  
23 Brown & Williamson monitored nicotine through the  
24 processing of tobacco into cigarettes. Can you tell  
25 us why Brown & Williamson monitored nicotine levels?

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1 A Well, nicotine is a basic ingredient of  
2 cigarettes and they tried to maintain the uniformity.

3           Q     Okay. Now, Doctor, you also testified  
4 previously with regard to ingredients in Brown &  
5 Williamson cigarettes. Could you tell us during  
6 your tenure at Brown & Williamson how many different  
7 ingredients were used in Brown & Williamson's  
8 products other than tobacco?

9           A     Approximately six or eight.

10          Q     Can you tell us what percentage of the  
11 cigarette was made up of ingredients other than  
12 tobacco during your tenure?

13          A     I would estimate less than one percent.

14          Q     Did you review the scientific literature  
15 at the time to determine in your own mind whether  
16 these ingredients were harmful at levels used in  
17 your products?

18          A     Yes, I did.

19          Q     And did you make a determination that  
20 these ingredients as used were appropriate?

21          A     Yes.

22          Q     Dr. Tucker, would you have allowed Brown &  
23 Williamson to use an ingredient in its product that  
24 you thought caused harm to anyone?

25          A     No.

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1           Q     Dr. Tucker, during your tenure at Brown &  
2 Williamson can you tell us whether or not the  
3 overall levels of tar and nicotine in Brown &  
4 Williamson's products was reduced?

5           A     Yes, it was.

6 Q Can you tell us, was this done in part  
7 through the selection of tobacco?

8 A Yes, in part.

9 Q Was it done in part through the use of  
10 filters?

11 A Yes, it was.

12 Q You testified also earlier with regard to  
13 British American Tobacco, an affiliated company of  
14 Brown & Williamson, creating a research facility in  
15 South Hampton in England. Do you recall that?

16 A Yes, I do.

17 Q Was the South Hampton research facility,  
18 was it actually up and running at the time you left  
19 the company?

20 A Just barely, yes.

21 Q Now, on occasion did you talk to  
22 researchers who worked at that facility in England?

23 A Yes, we did.

24 Q Were you generally aware of what research  
25 they were performing?

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1 A Yes, generally.

2 Q Can you tell me generally what that  
3 research was about.

4 A Well, it had to do with analyzing tobacco  
5 and to formulate blends of tobacco for manufacturer.

6 Q Doctor, during the time that you were at  
7 Brown & Williamson, to your knowledge, was the

8 research facility at South Hampton doing research on  
9 smoking and health?

10 A No, not to my knowledge.

11 Q Doctor, let me see if we can sum this up.  
12 Doctor, what do you say to the allegations that the  
13 cigarette manufacturers established the TIRC to fund  
14 junk science or to fund only science favorable to  
15 the tobacco industry?

16 A That's absolutely not true.

17 Q What would you say, Doctor -- what do you  
18 say, Doctor, to the allegation that the cigarette  
19 manufacturers retained Hill & Knowlton to mislead  
20 the American public about the dangers of cigarette  
21 smoking?

22 A That's not true.

23 Q What do you say, Doctor, that the SAB did  
24 not exercise independent judgment in evaluating  
25 research grants?

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1 A The SAB did exercise independent judgment.

2 Q Thank you, sir. Dr. Tucker, you were also  
3 asked by Mr. Wilner in the last session about  
4 research published by Dr. Cotin. Was Dr. Cotin free  
5 to publish any research he wished?

6 A Yes, he was.

7 Q And are you aware of any effort by any  
8 tobacco company or by the TIRC to prevent Dr. Cotin  
9 from publishing anything that he wished?

10 A Not to my knowledge.

11 Q Are you aware of anything that would have  
12 prevented any of the health organizations from  
13 promoting his research?

14 A No.

15 Q Before you came to be deposed was it  
16 correct, sir, that you had heard or read things in  
17 the press about the tobacco industry?

18 A Yes, I did.

19 Q Was it your belief that what was being  
20 said was untrue?

21 A Yes.

22 Q And did you come forward to give your  
23 testimony on your own initiative?

24 A Yes, I did.

25 Q Was it your desire to set the record

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1 straight, sir?

2 A Yes.

3 MS. HARTLEY: Your Honor, that's all we  
4 have.

5 THE COURT: Would you approach the side  
6 bar for just a moment. We don't need the court  
7 reporter.

8 (Side bar, Court and counsel)

9 THE COURT: Ladies and gentlemen, we're  
10 going to take the mid-morning break. I know you sat  
11 back there for a little while and we started late,  
12 but it's 20 minutes to 11. I'm going to ask that

13     you be back in the jury room at 11:00 and we'll  
14     start right back at 11.  
15             (Jury exits courtroom; recess)  
16             THE COURT:   Are you ready to proceed?  
17             MS. HARTLEY:   Yes, Your Honor.  
18             MR. NYHAN:    Yes, Your Honor.  
19             THE COURT:    I'm assuming that the -- are  
20     you going to read the rest of it?  
21             MS. HARTLEY:   We are going to play the  
22     deposition of Mr. Bennett LeBow.   The direct was an  
23     hour and four minutes, I believe, and then I thought  
24     we'd break for lunch and come back and play the  
25     other tape.

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1             MR. MATTHEWS:   They have not finished  
2     their review of cross.  
3             THE COURT:    I guess I misunderstood.  
4     You've completed Dr. Tucker's deposition?  
5             MS. HARTLEY:   Yes.  
6             THE COURT:    I thought they had a portion  
7     of Dr. Tucker's deposition to read.  
8             MS. HARTLEY:   I read that, Your Honor.  
9             MR. MATTHEWS:   So you'll know, I've  
10    related to Mr. Nyhan my conversations with  
11    Mr. Wilner regarding the documents and I think  
12    they're satisfied and there's not a problem with it.  
13             MR. NYHAN:    This relates to the motion in  
14    limine you heard earlier and we resolved that.  
15             THE COURT:    All right.   We will play the

16 first part of the tape. You let me know when you're  
17 ready to break for lunch and we'll come back. Who  
18 is going to do it?

19 MR. MATTHEWS: They're just going to stick  
20 it in and let it run, Judge. I think Stephanie is  
21 going to announce it.

22 THE COURT: Okay. That's what I wanted to  
23 know. I'll call on her to call the next witness.

24 Are you ready to proceed, Mr. Nyhan?

25 MR. NYHAN: Yes, Your Honor.

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1 THE COURT: Bring them in.

2 (Jury enters courtroom)

3 THE COURT: All right, Ms. Hartley, call  
4 your next witness.

5 MS. HARTLEY: Your Honor, we are now going  
6 to play the videotape deposition of Mr. Bennett  
7 LeBow who is the CEO of Liggett. Can we have the  
8 lights dimmed? Is that possible, Your Honor?

9 THE COURT: Okay. Mr. Backer, if you can  
10 turn out the lights in the back of the courtroom and  
11 leave the ones in the front. I think that worked  
12 pretty well -- the other way. Right.

13 THE BAILIFF: Is that all right?

14 THE COURT: I think that will do. Is that  
15 better?

16 MR. MATTHEWS: That's fine.

17 (The following video was played in open



18 court.)

19 Q Would you state your full name for the  
20 record?

21 A Bennett S. LeBow.

22 Q Mr. LeBow, we met informally. Let me  
23 reintroduce myself.

24 My name is Roman Silberfeld, and together  
25 with my partners and associates, we represent the

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1 State of Minnesota and Blue Cross/Blue Shield in a  
2 lawsuit against the tobacco industry.

3 You understand that, do you not?

4 A Yes.

5 Q We're here today to take your testimony in  
6 a number of capacities, really, but principally in  
7 terms of your capacity as the owner, if you will, of  
8 Liggett Group, all right?

9 A Through another company.

10 Q Through Brook?

11 A Through Brook, right.

12 Q All right. Well, we'll get to all those  
13 details in a minute.

14 You have been deposed and you've testified  
15 in trial on a number of occasions.

16 Do you think any useful purpose would be  
17 served by my going over the ground rules of a  
18 deposition with you?

19 A No, I understand.

20 Q Okay, great. What is your educational

21 background?

22 A I have a Bachelor of Science in electrical  
23 engineering and a year of graduate school.

24 Q Where did you get the electrical  
25 engineering degree?

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1 A Drexel University, Philadelphia,  
2 Pennsylvania.

3 Q In what year, sir?

4 A In 1960.

5 Q And there was one year of graduate work?

6 A Yes.

7 Q And in what subject?

8 A Computer and electrical engineering.

9 Q And where was that work done, Mr. LeBow?

10 A Princeton University.

11 Q Did that result in a degree being  
12 conferred?

13 A No.

14 Q Is that the extent of your formal  
15 educational training?

16 A Yes.

17 Q And did you have the one year of graduate  
18 school immediately after getting your Bachelor of  
19 Science degree?

20 A Yes.

21 Q So was it in about 1961 that you entered  
22 the work force?

23           A     That's correct.  
24           Q     And when you started working, what was  
25 your first job?

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1           A     In electrical engineering, computer  
2 engineering -- or electrical engineering, really, at  
3 that time.  
4           Q     Who did you work for?  
5           A     General Electric Corporation.  
6           Q     How long were you with GE?  
7           A     About six, eight months.  
8           Q     And then after that, where did you go to  
9 work?  
10          A     U.S. Army.  
11          Q     And how long were you in the service?  
12          A     Two years.  
13          Q     Roughly, 1962 to '64?  
14          A     That's correct.  
15          Q     Something in there. And when you came out  
16 of the Army, where did you next go to work?  
17          A     U.S. Army.  
18          Q     You stayed in?  
19          A     No, I stayed as a civilian for three  
20 years -- three more years.  
21          Q     While you were in the service, what was  
22 your job in the first two years?  
23          A     I was in charge of computer center in the  
24 Pentagon.  
25          Q     The computer center in the Pentagon?

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1 A Yes.

2 Q And then when you stayed on after your  
3 tour of duty, did you have the same job?

4 A No, I became assistant to the -- assistant  
5 vice chief of the staff for computers throughout the  
6 Army.

7 Q And am I right that that was roughly 1964  
8 to '67?

9 A Correct.

10 Q What did you do after that, sir?

11 A I started my own company.

12 Q And what was the name of that company?

13 A DSI Systems.

14 Q And what was the business of DSI Systems?

15 A It was a computer microfilm business.

16 Q You started that company from scratch?

17 A Yes.

18 Q And how long did you have that company?

19 A About three years.

20 Q What happened to the company?

21 A I sold it to another company.

22 Q And after DSI Systems was sold, what did  
23 you do for a living?

24 A I became an independent consultant.

25 Q In the area of --

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1           A     Everything -- computers, troubled  
2 companies -- everything -- finance.

3           Q     And this would have been approximately  
4 1970?

5           A     '71 maybe -- '70, '71 -- no, it was 1970,  
6 as a matter of fact. 1970 is correct.

7           Q     All right. So it was about 1970 that you  
8 became a consultant to both industries and troubled  
9 companies and in the general area of finance?

10          A     Uh-huh, that's correct.

11          Q     All right. And has that been what you've  
12 done roughly for the last 27 years?

13          A     That's -- roughly, that's correct.

14          Q     Okay. Have you over the course of the  
15 last 27 years focused on the computer end of  
16 business?

17          A     Not exclusively, no.

18          Q     Did that drop off at some point in terms  
19 of an area of interest?

20          A     No, we still have some computer  
21 interests -- no.

22          Q     Okay. Tell the ladies and gentlemen of  
23 the jury who will watch this what a troubled company  
24 is, as you used that term?

25          A     It's a company that has financial problems

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1     or other kind of legal problems or other issues of --

2 that would, you know, that would have investors not  
3 be willing to put money into it, something --  
4 anything that has problems associated with it,  
5 whether it be managing problems or financial  
6 problems.

7 Q And when you first started out as an  
8 independent consultant in 1970, did you actually  
9 acquire companies or did you just consult to them?

10 A The first ten or 15 years I was just --  
11 ten years just consulting to them, you know,  
12 inquiring sometimes, you know, small interests in  
13 the companies. Although, I guess, that's not  
14 totally true. Maybe I did acquire some controlling  
15 interests in the companies, so both. It was a  
16 combination of many things.

17 Q All right. So that we can have some  
18 reasonable idea of how all of this evolved, let's  
19 just take it in 10-year increments; how's that?

20 A Okay.

21 Q Let's start with the decade of the  
22 1970's.

23 A Myself and another partner -- other  
24 partners, we did acquire control of troubled  
25 companies during those years.

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1 Q Okay. Approximately how many companies?

2 A Somewhere -- without going back and  
3 looking at all the details, five to ten, in that

4 range -- maybe closer to five than ten.

5 Q Did any of those companies in the decades  
6 of the 1970s have anything to do with the tobacco  
7 business?

8 A No.

9 Q And during that time, is it true that you  
10 both acquired companies and sold some of the  
11 companies you had acquired in that decade?

12 A Possibly. I don't recall exactly.

13 (Change of reporters, 11:10 a.m.)

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1 Q And in addition to acquiring some number of  
2 companies, you also consulted for other firms; right?

3 A No, towards the end of the '70s I just pretty  
4 much just did the companies I had an interest in--  
5 controlling interest in.

6 Q Early in the '70s you would consult with  
7 others?

8 A Uh-huh (affirmative).

9 Q Yes?

10 A That's correct.

11 Q And as to some of those firms, you might have  
12 acquired a small interest but not a controlling  
13 interest?

14 A No. Usually I did consulting with them, or

15 if I did acquire an interest, it was a controlling  
16 interest. Maybe not controlling by myself, but with  
17 other people controlling interest.

18 Q So that your group --

19 A My group had a controlling interest, yes.

20 Q Got it. And did the practice that evolved by  
21 the 1970s, late in the '70s that is, you were acquiring  
22 troubled companies and basically consulting or devoting  
23 your energies to those firms. Did that continue to be  
24 true in the 1980s?

25 A Yes.

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1 Q For the whole decade of the '80s?

2 A Yes.

3 Q In looking at that decade, can you give us a  
4 reasonable estimate as to the number of firms that you  
5 and your group or your colleagues acquired in that  
6 decade?

7 A Again, maybe six to ten, in that range.

8 Q It was in the 1980s that you acquired  
9 Liggett; correct?

10 A Correct.

11 Q And we will talk about corporate structures  
12 in just a couple of minutes, but focusing on the 1980s,  
13 was it in 1986 that you acquired Liggett?

14 A That's correct.

15 Q And as of 1986, Mr. LeBow, about how many  
16 companies did your group control?

17 A In 1986?

18 Q Yes.

19 A Maybe two or three others.

20 Q In the 1980s did you do business under either  
21 a corporate or a partnership name?

22 A I believe in the '80s -- most of the '80s was  
23 under both, partnership and corporate names.

24 Q Which were the names?

25 A Well, the partnership I think was called  
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1 Brook Partners, which later on was turned into a  
2 corporation.

3 Q And that became what?

4 A Brook Group Limited.

5 Q Were there other names under which you did  
6 business other than either group partners or group --

7 A Both. Yeah, there were a couple of other  
8 companies. There was a company called LeBow Industries,  
9 which owned some other small companies. And then there  
10 was other companies I owned and controlled outside of  
11 Brook such as MAI Systems.

12 Q What was the business of MAI Systems?

13 A Computer business.

14 Q You owned that in the 1980s?

15 A I owned a controlling interest, yes.

16 Q Taking MAI as an example, what did it mean in  
17 terms of your daily activities to own a controlling  
18 interest in a firm such as MAI?

19 A Strictly a holding company position. I had



20 no operational control. Or I had no operational duties.  
21 Just as a holding company.

22 Q All right. When you say "a holding company,"  
23 what do you mean?

24 A I mean we controlled the stock. I mean, you  
25 know, we had theoretical control and as a member of the  
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1 board. I think MAI I was even chairman of the board --  
2 maybe. I don't recall exactly who was chairman.

3 Q When you say you had no operational control  
4 are you suggesting to us that there were people who ran  
5 MAI day to day?

6 A Yes, there was a president and, you know,  
7 obviously officers. We were not controlling it at all.  
8 I mean the companies I bought were in California or in  
9 New York.

10 Q So MAI was a company that was in the state of  
11 California?

12 A Correct. Headquartered there.

13 Q And it had officers and employees who ran the  
14 company day to day?

15 A That's correct.

16 Q And what sort of accountability to you  
17 holding the controlling interest in a firm such as MAI  
18 had?

19 A Just as a director, as a normal board of  
20 director's type of accountability.

21 Q Make a profit?

22 A Make a profit and --

23 Q Don't lose money?

24 A And don't lose money, and we had board  
25 meetings every so often and review the status and the

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1 position.

2 Q Continue on and expand the business?

3 A Yeah, and get monthly reports probably also.

4 Q And at or about the time that you acquired  
5 Liggett, did you have controlling interest in companies  
6 other than MAI?

7 A Not of any significance, no.

8 Q There were smaller companies that you owned  
9 as part of LeBow Industries?

10 A I would have to go back and check the time.  
11 You know, somewhere around there, later than that or  
12 earlier than that. I don't recall exactly when. There  
13 were a couple of other smaller companies that we were  
14 involved in at the time.

15 Q And those were under LeBow Industries?

16 A I am not sure. You know, different  
17 structures.

18 Q Did you have a controlling interest in those  
19 smaller firms as well?

20 A Yes.

21 Q Did you deal with them much in the same way  
22 as you dealt with MAI?

23 A Yes.

24 Q How is it that you came to acquire Liggett?

25           A       It was brought to me as a possible  
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1 acquisition by some -- by some bankers.

2           Q       As of that time had you had any experience  
3 whatsoever in the tobacco industry?

4           A       No.

5           Q       You understood when these investment bankers  
6 brought you this opportunity that Liggett was a tobacco  
7 company?

8           A       Obviously, yes.

9           Q       In deciding whether or not to acquire  
10 Liggett, did you engage in a process called "due  
11 diligence"?

12          A       Not very much, no.

13          Q       You understand what that term refers to?

14          A       Yes.

15          Q       Describe what you understand "due diligence"  
16 to me.

17          A       To go and check the books and records of the  
18 company and verify what's being represented to you.

19          Q       So that if somebody tells you, We have a  
20 hundred employees, one way of doing due diligence is to  
21 ask for the payroll records or the personnel records to  
22 see in fact there is a hundred employees?

23          A       That's correct.

24          Q       Or, conversely, if somebody says, We sold a  
25 million dollars worth of product last year, you ask to  
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1 see the record that corresponds with that sale. That's  
2 due diligence?

3          A       Correct.

4          Q       And when you said you did very little with  
5 respect to Liggett, what did you do, and explain the  
6 reasons for doing what you did.

7          A       We did almost nothing. I mean, because in  
8 this case the seller was a large corporation, and I made  
9 the seller represent and warrant all of the information.  
10 So, it's the kind of thing you check after the fact.  
11 You know, you don't bother checking before the fact to  
12 any great extent.

13          Q       The seller of Liggett was a company called  
14 Grand American?

15          A       No, Grand Metropolitan.

16          Q       Grand Metropolitan. I'm sorry. It's a  
17 British firm?

18          A       That's correct.

19          Q       Is it a very large firm?

20          A       Very large.

21          Q       And I take it having acquired companies in  
22 the past, there's basically two ways to go about  
23 checking out a company. One is to do due diligence in  
24 advance; right?

25          A       Correct.

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1 Q And the other is to get the seller, in this  
2 case Grand Metropolitan, to represent and warrant to you  
3 the condition of the company?  
4 A That's correct.  
5 Q And was that the way you chose when you  
6 acquired Liggett?  
7 A That's what I did, yes.  
8 Q Explain, if you would, what representations  
9 or warranties in this kind of a transaction mean?  
10 A It means that they guarantee you what they  
11 are telling you is correct, that the books and records,  
12 you know, say these things. And if it turns out the  
13 books and records don't say those, are not correct, then  
14 you have recourse back to them to make up the  
15 difference.  
16 Q So just to use an example, if they had said  
17 to you, Mr. LeBow, Liggett makes \$20 million of profit  
18 on an annual basis, and you accepted that  
19 representation, you buy the company, you come to find  
20 out later that it's not 20 million dollars, it's 10  
21 million dollars, you would have recourse back against  
22 the seller for the 10 million dollars; is that what you  
23 are saying?  
24 A That's correct, or multiple thereof.  
25 Q Or a multiple thereof. And why was it that  
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1 you chose the representations and warranties route  
2 rather than the due diligence route when you thought  
3 about acquiring it?  
4 A Well, I almost always do it that way. I --  
5 you know, I don't have the staff to do a huge due  
6 diligence. It doesn't really mean much anyhow. So  
7 that's normally the way I do every deal.  
8 Q Did you do any due diligence about Liggett  
9 before actually acquiring it?  
10 A As I said before, virtually nil. Virtually  
11 none. Other than maybe just me and the management, I  
12 may have taken a trip down there, see the company, that  
13 type of thing. Maybe stayed a day or two there. That  
14 was the extent of it.  
15 Q Did it appear to you at the time that Liggett  
16 was a good opportunity for you?  
17 A Yes. Again, you also have to look at the  
18 price you are paying. Vis-a-vis the price we are  
19 paying, yes, it looked like a good opportunity.  
20 Q And why was that? Why did it appear to you  
21 to be a good opportunity?  
22 A Because we were paying what appeared to be  
23 less than the book value.  
24 Q What does "book value" mean?  
25 A The net worth of the company. The net value  
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1 of the company on its -- its assets less its  
2 liabilities. So we were paying a little bit less than  
3 that value, and we had guarantees from Grand  
4 Metropolitan that these numbers were all correct. So  
5 the downward risk seemed very small.

6 Q About how long did it take to consummate the  
7 transaction from the time the investment bankers first  
8 brought it to you until the ink was dry on the  
9 agreement?

10 A About two or three months in that time  
11 period.

12 Q Had you wanted to do and had the staff to do  
13 a full due diligence examination, how long would that  
14 have taken?

15 A A month.

16 Q Was there some time pressure associated with  
17 the transaction?

18 A Yes.

19 Q And what was that?

20 A They gave us a deadline, the seller, that we  
21 had to close by a certain date. They had some reason  
22 they wanted to close by a certain date. Exactly what it  
23 was I don't recall. That was the only time pressure.  
24 It was self-imposed by them.

25 Q And at the time that you acquired Liggett,  
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1 did you do anything then in 1986 to determine what it  
2 was that Liggett knew about the tobacco products that it  
3 sold in terms of their health effects?

4 A No.

5 Q Did you do anything at that time to find out  
6 what Liggett knew about the addictive qualities, if any,  
7 of its products?

8 A No, I didn't do anything.

9 Q Or how it conducted its advertising?

10 A No, I didn't do anything.

11 Q Or marketing?

12 A No. Again, we did no due diligence.

13 Q And when you acquired the company, it had a  
14 management in place, did it not?

15 A Correct.

16 Q Did you keep all those people?

17 A Yes.

18 Q A corporation is typically run by a board?

19 A Actually, it was run by the president and his  
20 officers.

21 Q And they answer to a board?

22 A To a board, yes.

23 Q And then when you acquired Liggett, did you  
24 acquire one or more seats on the board?

25 A Well, actually, we acquired control of all  
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1 the board seats.

2 Q How many board seats were there at Liggett  
3 when you took control?

4 A I don't know if there were any. It was a  
5 wholly-owned subsidiary of Grand Metropolitan, so I  
6 don't know if they had a board. I really don't know.

7 Q When you took control of the company, did you  
8 install directors?

9 A Yes.

10 Q And who were the directors?

11 A I don't recall. I am sure I was one of them,  
12 and I am sure the president of the company, who was  
13 running the company, was one of them. The rest of the  
14 directors, I don't recall who they were.

15 Q When you first acquired the company, do you  
16 recall any significant management changes in terms of  
17 the day-to-day operations of the firm?

18 A No. We made absolutely no changes.

19 Q And how long was that true that management  
20 that was there when you acquired it stayed in place?

21 A Well, I think the president stayed a good  
22 five years maybe until he retired. I don't recall  
23 exactly when he retired. But, you know, I would think  
24 it's five or six years later, something in that nature.

25 Q Do you recall who that was?

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1 A Yeah, Mr. K.V. Dey, D-e-y. K, period, V,  
2 period, Dey. Last name is Dey, D-e-y.

3 Q Were there a number of vice presidents under  
4 Mr. Dey?

5 A Yes.

6 Q Do you recall that some number of them stayed  
7 more than a year after you took control of the firm?

8 A They stayed with Mr. Dey all along. Some  
9 stayed even after he retired. So exactly when each one  
10 left I don't -- you know, I don't recall exactly the  
11 timing of it. But most of them, we made absolutely no  
12 changes until probably '93 -- '92/'93 after he retired.  
13 He retired, I think, in '91, if I had to guess, thinking  
14 about it.

15 Q Owning a controlling interest of a company  
16 like Liggett, I take it you had the right, if you chose  
17 to, to go in and clean house and fire everybody?

18 A The board of directors, which we controlled,  
19 had the right, that's correct.

20 Q And if you chose to, you could have gone in  
21 and changed policy at Liggett?

22 A Well, no, you change management, and the  
23 management change policy.

24 Q In accord with what the board wants?

25 A Yeah, that could be done.

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1 Q And when you acquired Liggett, you left it  
2 exactly as it had been the day before you acquired it?

3 A That's correct. We had no reason to even  
4 suspect changing anything. We didn't change anything.

5 Q And as far as the day-to-day operations of  
6 Liggett was concerned from and after the time you bought  
7 it until recently, that firm continued to operate as it  
8 had in the prior period of time before you took control?

9 A That's right. That's correct.

10 Q In leaving management in place, did you rely  
11 on their background and experience in doing what they  
12 had done for Liggett?

13 A They had been there for many, many years.

14 Q How long had Mr. Dey been there?

15 A I don't know, but I am sure, you know, 20,

16 30, 40 years. I mean a long.  
17 Q A long time?  
18 A A long time. The whole management team had  
19 been there a long time.  
20 Q So is it true that Brook Group, which owned  
21 Liggett, relied on Liggett management to run that  
22 business?  
23 A Absolutely true.  
24 Q Wholly and completely?  
25 A Wholly and completely.

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1 Q And is it also true that you relied on  
2 Liggett management to make appropriate business  
3 decisions about every aspect of the business?  
4 A Absolutely. We never got involved at all.  
5 Q And is it also true that you relied on  
6 Liggett management and their inside and outside counsel  
7 to make legal decisions incident to the company's  
8 business?

9 A Absolutely true.

10 Q Before 1995 did you ever inject yourself or  
11 Brook Group into the day-to-day operations of Liggett?

12 A Temporarily in -- again, I'm guessing -- in  
13 late '92 or early '93 we temporarily, myself and one of  
14 my partners, we had to get involved because we had a  
15 problem with the new management being put in. So we  
16 were involved for a few months' period until we found a  
17 new manager. About three or four months we were  
18 involved.

19 Q And that was at about the time that Mr. Dey  
20 left?

21 A Mr. Dey left, and then an individual who was  
22 head manufacturing had been there 30 or 40 years was put  
23 in charge for about a year, year and a half. And then  
24 we got rid of him, and at that point myself and two  
25 other people, you know, as a committee was running the

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1 company for a few months until we found a new tobacco  
2 executive to come in.

3 Q And that was in -- sometime in '92/'93 time  
4 frame?

5 A Maybe I am wrong timewise. Now I'm thinking.  
6 No, I take it back. It was later. This  
7 was -- no, it was probably '92 -- I would have to go  
8 back and check my notes now. I am getting confused with  
9 the time frames and the presidents. Yeah, '92/'93.

10 Let me -- let's go back. Mr. Dey, I guess,  
11 left -- he must have left earlier, like '90. Then  
12 Mr. Turner was there for about a year, year and a half.  
13 And then I brought in another group of managers in,  
14 nonconsumers experts, consumer product experts for a  
15 couple of years to run the company. After they left is  
16 when myself and these other two gentlemen went in on an  
17 interim basis to run it before we found a tobacco  
18 executive.

19 Q Who was the tobacco executive that came in?

20 A Ed Horrigan. And this was in like late '92,

21 early '93.  
22 Q In that three- or four-month period of time  
23 that you and colleagues ran the company?  
24 A As a committee, yes.  
25 Q During that time did you make any decisions  
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1 that you can recall relative to any litigation against  
2 the company?  
3 A No.  
4 Q What sorts of things did you attend to in  
5 that three or four year period?  
6 A We just tried to, you know, keep things  
7 running while we replaced management. It was strictly  
8 an interim thing. It was announced as an interim thing.  
9 It was strictly a temporary thing for about three or  
10 four or five months.  
11 Q And if we just broadly look at the period  
12 1986 to 1992, up to the time you spent three or four  
13 months running Liggett, would it be true that Liggett  
14 was to you a company in which you had a controlling  
15 interest?  
16 A Yes.  
17 Q And a company that only reported really to  
18 you through its management?  
19 A That's correct.  
20 Q And only reported to you in sort of a bottom  
21 line sense, Are we making money, Are we losing money?  
22 A That's all we saw. We got a monthly report  
23 on financials, and that was it. By the way, now the  
24 time is getting better. I think it was now '93 when we  
25 ran it, during the early part of '93 was the time.  
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1 Q After this short stint running the company,  
2 did you ever run it hands-on again up to today?  
3 A No. Again, I didn't run it hands-on during  
4 that period of time. I was just there for a day every  
5 two weeks just to make sure things were -- you know, in  
6 theory we had the title, but we were never there full  
7 time to operate the company.  
8 Q Because you still had vice presidents  
9 running.  
10 A Right. They were running for a period, but  
11 we had an official title being coexecutive officers,  
12 chief executive officers.  
13 Q Who shared that with you?  
14 A Two other gentlemen.  
15 Q Their names are?  
16 A Richard Wrestler and Ruben Chakalian,  
17 C-h-a-k-a-l-i-a-n.  
18 Q After that period of time in '93 up to the  
19 present your focus about Liggett unrelated to the  
20 cigarette litigation in the last two years or so has  
21 been on whether the company made money or lost money?  
22 A No. I had other companies to watch and worry  
23 about. Brook was just a holding company. Brook held  
24 Liggett, held MAI, Western Union. Bunch of other  
25 companies that we owned stock in and we managed.

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- 1 Q You just mentioned Western Union. When was  
2 Western Union a part of Brook Group?  
3 A It was purchased in '87. The end of '87.  
4 Q And how long did you hold it?  
5 A We sold it -- it was sold in late '95.  
6 Excuse me. Late '94, early '95.  
7 Q So at the time Liggett was a part of Brook  
8 Group, so was Western Union and so was MAI?  
9 A That's correct.  
10 Q Any other firms that you can think?  
11 A Couple of other smaller ones. They were the  
12 main holding group.  
13 Q When was it, Mr. LeBow, that you first  
14 thought about or considered cigarette litigation or  
15 tobacco litigation that involved Liggett?  
16 A I had known about it obviously since day one,  
17 since the beginning, but never paid much attention to  
18 it. In 1988 the Trubalone trial came and went, which  
19 Liggett was a defendant, but I never paid much attention  
20 to it at all.  
21 Q You knew at the time you acquired the company  
22 that Liggett was a party to cigarette cases?  
23 A Yeah, there were 20-some-odd cases at the  
24 time I think. Just approximately.  
25 Q And how did you assess that situation?

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- 1 Meaning what did you think Liggett's potential liability  
2 would be?  
3 A I was told by all the attorneys involved, I  
4 mean Liggett inside attorneys and the outside attorneys,  
5 that there was no issue; that the company has never paid  
6 a penny in 40 years, and there was nothing involved in  
7 this. So I didn't focus on it at all.  
8 Q They assured you that the track record had  
9 been good?  
10 A Right.  
11 Q And everyone figured the track record would  
12 continue out into the future?  
13 A I really didn't focus on it at all. I mean,  
14 I just -- you know, there was no liabilities around, and  
15 a few lawsuits here and there didn't mean anything.  
16 Q When you first acquired Liggett, did you  
17 personally give any thought to whether the products that  
18 the company was selling caused any harm?  
19 A Well, I saw warning labels and knew about  
20 that, so obviously I was aware of that.  
21 Q Did you think at that time in 1986 that  
22 nicotine in cigarettes was addictive?  
23 A I never focused or thought about it at all.  
24 Q And did you think at all in 1986 about  
25 whether or not advertising or marketing activities were

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- 1 directed at young people?



2           A       I didn't think about it much because Liggett  
3 did very little advertising. So, I -- A, I didn't think  
4 about it, and, B, we had very little advertising, you  
5 know, and still do to this day. We were just not  
6 focused on the advertising at all.

7           Q       From and after the time that you acquired  
8 Liggett in '86, did you become involved in any industry  
9 activities, you yourself?

10          A       No.

11          Q       Ever?

12          A       Ever.

13          Q       Up to today?

14          A       Up till today.

15          Q       So you have never represented Liggett at any  
16 tobacco industry meetings or functions or conventions  
17 or --

18          A       I think there was one function from UJ, you  
19 know, honorary thing, dinner I went to once maybe six,  
20 seven, eight years ago. That was it. I never went to  
21 any meetings or anything else.

22          Q       Liggett did have representatives for the  
23 company that attended, for example, Tobacco Institute  
24 meetings?

25          A       I believe they did, yeah. The management  
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1 did.

2           Q       And for some years Liggett was a member of  
3 the Council for Tobacco Research?

4           A       I guess. I don't know for sure.

5           Q       But whoever those people were that  
6 represented Liggett, it was never you except for that  
7 one charity instance you mentioned?

8           A       It was not me, and it was not any of the  
9 Brook people ever.

10          Q       Let's jump forward in time.

11          A       Uh-huh (affirmative).

12          Q       Just to bracket this a little, Mr. LeBow. It  
13 was in late 1995 that you first focused on what you were  
14 being told by your lawyers?

15          A       That's correct.

16          Q       We will get to those things in a couple of  
17 minutes. Let's just talk about that period of time from  
18 '86 until '95. During that period of time, '86 to '95,  
19 including the three or four months that you had the  
20 title at Liggett --

21          A       Uh-huh (affirmative).

22          Q       -- did you at any time investigate what the  
23 company knew about the health effects of smoking?

24          A       Only two instances happened during that  
25 period of time which focused on. One was I was deposed  
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1 by Mr. Rosenblatt down in Florida at a deposition, and I  
2 think for the first time I met one of the outside  
3 counsels during that deposition.

4           A       And the other time was I was -- happened to be  
5 at Liggett just going over financials in I guess it was  
6 '94, when Mr. Horrigan was preparing for his

7 congressional testimony, and we had a little  
8 conversation at that point. And towards the end --  
9 towards '94/'95, after that, I started asking the inside  
10 counsel for some reports because I didn't understand all  
11 of these issues, who was suing, what was suing. I  
12 started to look at it a little bit deeper and get some  
13 reports, ask for some reports in '94/'95 to get a better  
14 feel for things.

15 Q The deposition you mentioned was in 1993 in  
16 the summer?

17 A Yes, I believe so.

18 Q And it was in the course of preparing for  
19 this deposition that you met for the first time one of  
20 Liggett's outside lawyers?

21 A Either the first time or second time. I  
22 mean, I may have met him briefly -- I probably met him  
23 briefly a year or two before.

24 Q And "outside lawyers" just refers to a lawyer  
25 that is not directly employed by Liggett?

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1 A Inside, right. He's outside. Works for a  
2 law firm outside of the company as opposed to working  
3 for the company.

4 Q Which firm was that?

5 A At the time I think it was Webster Sheffield  
6 in the firm.

7 Q And did you and this lawyer as you were  
8 preparing for your deposition in 1993 talk about what  
9 the company knew about the health effects of smoking and  
10 whether or not nicotine was addictive?

11 A We talked a little bit about it, yes.

12 Q What was the substance of the conversation?

13 A You know, he said to me, you know, One of the  
14 questions you may be asked is whether nicotine is  
15 addictive or not. I said, In my case, I didn't think it  
16 was that addictive because I stopped smoking 20 or 30  
17 years ago. But, you know -- so I will answer it my own  
18 personal basis. And as far as -- If he asks questions  
19 about the health effects, he advised me to say, you  
20 know, no one has ever proven anything, no one knows, and  
21 so forth. So I believe I answered, I really don't know.  
22 That was the essence of the conversation.

23 Q The other instance you mentioned is in 1994  
24 when Mr. Horrigan was preparing to testify before  
25 Congressman Waxman's committee, correct?

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1 A Correct.

2 Q And you and he had a conversation at that  
3 time?

4 A I didn't know anything about it. I just  
5 happened to be there at Liggett, and I saw him preparing  
6 all day long with the lawyers for this deposition or  
7 hearing or, whatever, and I just inquired what was going  
8 on, what's this all about, and he was all nervous and  
9 everything, that he had to go to Washington and appear  
10 before some committee. And that was the extent of it.

11 Q Did you learn anything in the course of that

12 conversation?  
13 A No, I didn't talk any details with him, no.  
14 Q And then it was in 1995, I think, that you  
15 yourself first focused on the question of smoking and  
16 health?  
17 A Yeah, I started then asking the attorneys,  
18 the one -- the attorneys in-house in Liggett. Joe  
19 Murray who was the attorney -- the main attorney for  
20 Liggett to start sending me some reports about things.  
21 I wanted to start understanding more about the legal  
22 aspects because I didn't really understand anything.  
23 And he did start sending me, you know, I guess once a  
24 month a status report on litigation in '95.  
25 Q What sort of information was contained on  
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1 these status reports that you got?  
2 A What the plaintiffs basically -- the case  
3 was, what the issues were. You know, more legal than  
4 anything else. What the status of the -- how many  
5 lawsuits we had, what the status of each lawsuit was,  
6 things of that nature just to get better information  
7 what was going on, which I never, you know, asked for  
8 before.  
9 Q And in the reports that you got from  
10 Mr. Murray, he told you, I take it, what the issues  
11 were, what the claims were about?  
12 A Correct.  
13 Q And did you inquire at that time as to what  
14 Liggett's answer was or response was to those things?  
15 A No. I just, you know, filed the reports in  
16 my -- you know, myself, and just wanted to be kept  
17 abreast. I did not delve into it in any detail.  
18 Q How long had Webster & Sheffield been  
19 Liggett's outside counsel?  
20 A As far as I -- as long as I know.  
21 Q Long time?  
22 A Long time. 20 years, 30 years. I have no  
23 idea.  
24 Q And had that firm done all of Liggett's  
25 tobacco-related work?  
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1 A Yes, that's all they did do for us.  
2 Q And --  
3 A Tobacco litigation related work.  
4 Q Yes.  
5 A Yes.  
6 Q Mr. Murray, how long had he been at Liggett?  
7 A Many years. 20 years. I don't know exactly  
8 how long.  
9 Q And in getting information both from the  
10 outside counsel, Webster, and from Mr. Murray, did you  
11 rely on that information?  
12 A Absolutely.  
13 Q And did you accept it as true?  
14 A Yes.  
15 Q What happened, Mr. LeBow, in 1995 that caused  
16 you to investigate further?

17           A       Well, a few things happened. First of all,  
18 Webster & Sheffield, I think a couple of years earlier  
19 had dissolved, and the group of other attorneys went to  
20 Mudge, Rose. So just the same attorneys, but just at  
21 another outside law firm.

22           Then, you know, a couple of strange things  
23 happened in '95 which started me to really thinking  
24 seriously that maybe I really don't understand what's  
25 going on here.

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1           The first thing happened was in September of  
2 '95 or so, Mudge, Rose, this law firm was dissolved, had  
3 their own problems. The firm was breaking up. And this  
4 group of attorneys came to me and said, you know, they  
5 would like to go to another law firm, would I agree for  
6 them to go to another law firm. I said, Which law firm,  
7 and they told me Latham & Watkins, and I said, I don't  
8 know. Let me call you back and let you know.

9           And I had known -- I had met Mark Kasowitz  
10 from the Kasowitz, Benson, Torres & Friedman firm who  
11 were specialists in product liability and I thought it  
12 was a good idea now for this group of attorneys, since  
13 Mudge, Rose was breaking up, to go to this firm where I  
14 knew the people. So I suggested instead of going to  
15 Latham & Watkins they go to Kasowitz's firm and take the  
16 business there. The reason being, I could get -- you  
17 know, I could get -- I had a better relationship with  
18 the senior partner there. I didn't know any of the  
19 Mudge, Rose senior partners, or any of the Latham,  
20 Watkins senior partners for that matter.

21           So they called me back two days later and they  
22 told me if I let them go to Latham, Watkins, Philip  
23 Morris will pay all of my legal fees, and I couldn't  
24 understand why. All of a sudden Philip Morris wants to  
25 pay my legal fees?

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1           So, you know, I spent -- you know, not to look  
2 a gift horse in the mouth, so to speak, for the time  
3 being -- I was very busy on some other things. I said,  
4 Fine, go there. Make an agreement with Philip Morris,  
5 let them pay the legal fees. But it really started me  
6 thinking that something is not right. I couldn't  
7 understand why my attorneys were willing to be paid by  
8 one of my competitors. That really started me thinking  
9 that something is not right here.

10           So I'm sorry. Go ahead.

11           Q       No competitor had ever offered to pay your  
12 legal fees before?

13           A       Pay anything for me before. That's not the  
14 way it's supposed to be. I mean, I could foresee a  
15 case -- it made no sense to me, because I could foresee  
16 an instance where we'd have a conflict. You know,  
17 Philip Morris and I didn't always see eye-to-eye on  
18 everything, or didn't at that time. Obviously today  
19 don't. But that really bothered me. It really started  
20 me thinking that something is not right here. There is  
21 something here I don't know.

22 Q And the amount of money involved was not  
23 small?  
24 A No, it was like eight million dollars or so a  
25 year, or something in that range.

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1 Q So that to the extent Philip Morris was  
2 willing to pick up Liggett's legal fees, it was a  
3 significant commitment on their part?

4 A Well, that's relative, I guess. Relative to  
5 Philip Morris. Significant to us. And, you know,  
6 meaningful to me. And it really -- like I say, it  
7 really started me thinking that something is not right  
8 here.

9 Q What else happened in '95?

10 A At the time I was involved with a proxy fight  
11 with RJR, and -- in which the shareholders were all  
12 asking -- not asking but demanding RJR break up its  
13 business between tobacco and food, Nabisco, and RJR was  
14 publicly and privately saying they can't do it because  
15 of all of the litigation -- tobacco litigation. And I  
16 couldn't understand that.

17 I said, What tobacco litigation. I have been  
18 told for years there is no tobacco litigation. There  
19 are no issues. There is a few lawsuits around that, you  
20 know, some crazy lawyers are trying to do, and it made  
21 no sense. So between that and Philip Morris paying my  
22 legal fees, I figured these guys are lying. These guys  
23 are not telling the truth. Something is not right. And  
24 that's when I decided that this doesn't make sense, and  
25 these guys are just not telling me the truth. I am not

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1 hearing the truth from these people, because these two  
2 events did not add up to me.

3 Q Didn't make any sense?

4 A It made no sense to me whatsoever. None  
5 whatsoever. And that's what started me -- then I  
6 started conferring with the Kasowitz firm, the lawyers I  
7 wanted these people to go to, and I said, I want to  
8 study this now. I want to see what's going on.

9 Q What instruction and direction did you give  
10 the Kasowitz firm when you first had them look into  
11 this?

12 A Well, when I first started looking into it,  
13 understand that I now did not really trust my own  
14 lawyers. When these two things happened, especially  
15 them accepting or recommending -- worse yet,  
16 recommending that I accept Philip Morris' legal fees, I  
17 now -- I now felt very uncomfortable. That -- so we had  
18 nothing to look at. We had no documents or anything to  
19 review. We had very limited stuff. So I figured the  
20 best way to really find out -- really find out what's  
21 going on is say, Look, let's talk to the other side. I  
22 mean, why can't we sit down and talk to the plaintiffs  
23 in this case and try and figure out what's happening.

24 As it turned out, Mr. Kasowitz had a very good  
25 relationship with one of the others attorneys. He had

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1 just settled another case not involved in tobacco but  
2 involving something else, and they had preliminary  
3 meetings with him.  
4 Q And that was Mr. Barrett in Mississippi?  
5 A That's correct.  
6 Q And Mississippi at that time was one of the  
7 states that had filed suits against Liggett and others?  
8 A That's correct.  
9 Q And you instructed or authorized Mr. Kasowitz  
10 to have conversations with Mr. Barrett?  
11 A Yeah. Mr. Kasowitz and Mr. Benson here also.  
12 Q Mr. Benson is here today with us?  
13 A That's right.  
14 Q And was that about settlement at that point?  
15 A No. Well, it was first initially it was  
16 about, you know, trying to understand what was  
17 happening, what this was all about, because, you know,  
18 you can't understand these things until you really talk  
19 to people.  
20 Q You weren't satisfied when you asked the  
21 Kasowitz, Benson firm to become involved that you had  
22 been told the truth about what the plaintiffs' cases  
23 were about?

24 A That's correct. I was not satisfied.  
25 Q And I take it both Mr. Kasowitz and  
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1 Mr. Benson and maybe others then had conversations with  
2 Mr. Barrett and maybe others?  
3 A That's correct.  
4 Q And what did they tell you?  
5 A They came back and told me that there is some  
6 serious issues here and with these lawsuits, and I  
7 started to find out more about the issue of nicotine  
8 being addictive and people not being warned about it.  
9 You know, this was one of the main issues that the other  
10 side was talking about. And I started to get concerned  
11 about it.  
12 I said, Maybe there's something here. I don't  
13 know. If there's something here, let's sit and talk and  
14 maybe, you know, make a settlement, if we could, and try  
15 to understand it more.

16 Q Did the Kasowitz, Benson firm at some point  
17 look at some of Liggett's documents at your instruction?  
18 A Not at this point, no. No, I didn't want the  
19 other -- the attorneys -- my own attorneys to know what  
20 I was doing.  
21 Q All right. So as of this point in time when  
22 you first instructed the lawyers, Mr. Kasowitz and  
23 Mr. Benson, to talk to the plaintiffs' lawyers, you  
24 hadn't looked at any documents through them?

25 A No. They hadn't look at any documents, and  
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1 neither had I.  
2 Q And the reports you got back about the

3 conversations with the plaintiffs' lawyers, how did you  
4 react to that?

5 A I thought it was time to sit down and talk.  
6 I wanted to learn more about it. I got very curious.  
7 Things didn't make any sense. Again, you had these two  
8 events happening. I couldn't look at the documents  
9 because if I looked at documents, people would suspect,  
10 what am I doing, why all of a sudden I want to see  
11 documents.

12 Q Hadn't looked at them for nine years?

13 A Never. Never looked at them ever. But I had  
14 an intuitive feeling that this isn't right, that  
15 something here doesn't add up. Why are these two major  
16 companies, one paying my legal fees and the other one  
17 saying they can't do things legally. You know, why are  
18 they so concerned that they're telling me through my  
19 lawyers, not directly, but through my lawyers that there  
20 is no issue here. We win every lawsuit and we are going  
21 to beat everything. There's nothing to worry about. A  
22 few lawsuits and no big deal. And I didn't believe  
23 them.

24 Q You didn't believe them anymore?

25 A Anymore.

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1 Q Had you believed them up to that time?

2 A I didn't focus, but -- you know, I believed  
3 them because I had no reason not to believe them.

4 Q Mr. LeBow, before we continue with the  
5 meetings that you had with lawyers from Kasowitz, Benson  
6 and the plaintiffs' lawyers, I want to step back for a  
7 moment, if we may, and ask you -- sorry. Start over.

8 Ask you whether at the time that you first  
9 acquired Liggett you understood that Liggett cooperated  
10 in terms of positions it took with other tobacco  
11 companies that were also involved in cigarette or  
12 tobacco litigation.

13 A I knew that during this period of time, '88  
14 to '86, till then, till about '94, '95, that Liggett and  
15 all the other tobacco companies acted together, and they  
16 were joint defendants in a lot of lawsuits. And Liggett  
17 being the smallest one, having only 2 percent, 3 percent  
18 of the market share, we just kind of just went along  
19 with everybody else.

20 Q From what you understood about that approach  
21 to the defense of tobacco cases, were there leaders in  
22 the group?

23 A Yes. The major tobacco companies were the  
24 leaders.

25 Q And who were they?

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1 A Philip Morris and RJR, and sometimes, you  
2 know, depended on the case. Some cases had some  
3 companies and some cases did not.

4 Q But in the general sense Liggett went along  
5 with the defense of the tobacco cases along with the  
6 other companies?

7 A It was my understanding, as I said, we were

8 paying maybe 6 to 8 million dollars a year. The other  
9 companies were spending hundreds of millions of dollars  
10 a year for the same cases. So we were pretty much  
11 piggybacking on what they were doing. They were leading  
12 the defenses, spending hundreds of millions, and us  
13 spending 7, 8, 9 million, whatever it might be.

14 Q Before the break we were talking about the  
15 conversations that your new counsel, the Kasowitz,  
16 Benson firm, was having with the attorneys representing  
17 some plaintiffs, and this was in 1995 or early '96; is  
18 that true?

19 A That's correct.

20 Q And at that time other than the personal  
21 injury cases that were pending against Liggett, how many  
22 cases were pending at that time that had been brought by  
23 states or entities?

24 A I think there were six or seven, and there  
25 was this large class action called the Castano class  
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1 action.

2 Q And that was a case pending in Louisiana?

3 A That's correct.

4 Q And what did you understand that case to be  
5 about?

6 A That's the first time I really understood  
7 that the case to be about nicotine and addiction; that  
8 people were not warned that nicotine is addictive, and  
9 they had no problems vis-a-vis nicotine.

10 Q After the first round of conversations  
11 between your new lawyers, Mr. Kasowitz and Mr. Benson  
12 and their firm, and the plaintiffs' lawyers, did  
13 something else occur in terms of getting information?

14 A No, not during this time.

15 Q When was that that you next -- you next had  
16 conversations with some of the state Attorneys General  
17 or the private lawyers representing the states?

18 A Well, Mr. Kasowitz and Mr. Benson had some  
19 conversations with the lawyers and felt that we could --  
20 we could strike a deal with the plaintiffs at this point  
21 in time. And I authorized them to set up meetings, and  
22 we met -- we all -- Let's all meet together face-to-face  
23 and try to hammer out a deal and understand each other's  
24 positions.

25 Q And did you attend one or more of those  
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1 meetings?

2 A Yes.

3 Q And in the course of that, did you learn more  
4 about what the issues in these smoking cases were?

5 A Yes.

6 Q What did you learn?

7 A I learned nicotine was a major issue, which I  
8 never realized before that the addiction of nicotine was  
9 the major issue that everyone was focusing on.

10 Q And this applied to both the state cases and  
11 the Castano case?

12 A That's correct.



13 Q And was that the first time that you really  
14 saw nicotine as being a major issue in these cases?  
15 A Yes.  
16 Q And did these plaintiffs' attorneys and the  
17 Attorneys General tell you and your lawyers in the  
18 course of these meetings that they firmly believed that  
19 nicotine produced an addiction?  
20 A Yes.  
21 Q Nicotine in cigarettes?  
22 A Yes.  
23 Q What was your reaction to that?  
24 A I thought intuitively they are correct. I  
25 mean, to me it made sense. You know, I have seen  
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1 some -- the only thing, I was a little confused because  
2 I have seen people quit. I have seen people, you know,  
3 who can't quit. So, again, not being a scientist or an  
4 expert in this area, just as a layman, I was somewhat  
5 confused at this point in time. I thought they had, you  
6 know, interesting aspects to this.  
7 Q Did you do anything to try to deal with the  
8 confusion you were feeling at that point?  
9 A No, at that point I had no resources to do  
10 that. I mean, I couldn't even call up and ask my own  
11 people at Liggett. Because I would not talk to any of  
12 them at that time, because we were doing all of this in  
13 secret, these negotiations. Again, my own in-house  
14 attorneys I felt weren't necessarily looking out for my  
15 own best interest.  
16 Q Or the interests of the company?  
17 A Or the interests of the company.  
18 Q Or the interests of the shareholders?  
19 A Or the interest of the shareholders, or the  
20 employees, or however you want to do it. It did not  
21 make sense to me the things that they were saying.  
22 Q And did you at any point in time go to your  
23 outside lawyers, the ones who had gone to Latham &  
24 Watkins, to ask them what they knew about this topic?  
25 A No. I considered them in the same boat as  
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2397  
1 the in-house lawyers. I considered them all the same.  
2 I did not talk to any of them.  
3 Q And that's because -- that's because --  
4 A That's because of what happened. This thing  
5 with Philip Morris paying our legal fees, it bothered me  
6 a lot, and, you know, it was recommended to me by my  
7 in-house lawyers and obviously outside lawyers, they  
8 went to Latham, Watkins and they took the money, and  
9 that bothered me.  
10 Q At some point in time you struck an agreement  
11 with the Castano group?  
12 A That's correct.  
13 Q And you struck an agreement with a few of the  
14 states?  
15 A Five of them.  
16 Q When was that, Mr. LeBow?  
17 A This is March of '96.

18 Q Why did you make that agreement?  
19 A Well, couple of reasons. First of all,  
20 Liggett being, again, being the smallest of the tobacco  
21 companies, we couldn't afford to lose anything. I mean,  
22 if we were to lose any one lawsuit, we would be  
23 bankrupt. So, from the economic point of view, your  
24 know, it was the right thing to do. And I had a very,  
25 very wrong feeling about what the other companies were  
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1 telling me.  
2 I mean, I started hearing, you know, some of  
3 the other side which made a lot of sense. I mean, what  
4 they were saying to me, the plaintiffs, started to make  
5 some sense here. I said, you know, I should settle  
6 this. This doesn't make any sense to go to court.  
7 Maybe these guys are right. Maybe nicotine, you know --  
8 nicotine probably is addictive, but I didn't have any  
9 information at that time. But some of these facts, you  
10 know, made sense to me.

11 Q Did you make the agreements because you  
12 thought it was the right thing to do?

13 A And I thought it was somewhat the right thing  
14 to do. But, again, at this point in time I didn't have  
15 any facts. I didn't have any documents to look at. I  
16 didn't have any of my own inside experts to talk to. I  
17 had no one to talk to. I mean, I was just doing it on  
18 an intuitive basis myself and just looking at the law at  
19 this point in time and economics. The actual facts  
20 about litigation, tobacco, and cigarettes I didn't have.

21 Q After the first settlement agreement in 1996,  
22 did you continue to learn more about what Liggett knew  
23 and when it knew it having to do with health and  
24 addiction?

25 A Right after the settlement these lawyers for  
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1 Latham, Watkins -- I didn't have to fire them. They  
2 came in and fired me. They quit because I went and made  
3 the settlement without them.

4 Q Tell us how that happened.

5 A I think we got a letter the next day saying  
6 they resigned from the case. Or couple of days later  
7 they sent a letter saying resigned, and I basically told  
8 them what I told the Kasowitz firm. You took over.  
9 And, you know, I'm happy they resigned because I was  
10 getting ready to fire them. So they quit. They sent a  
11 letter resigning, and we were happy, although there were  
12 a couple of cases I think they had to stay on for some  
13 technical reasons. I then instructed the Kasowitz firm  
14 to get all of the documents away from them. I put the  
15 Kasowitz firm in charge of everything.

16 Q What did you tell the Kasowitz firm to do  
17 with the documents?

18 A I told them to do whatever they were supposed  
19 to do. I wanted to know what's in those documents. I  
20 wanted to study them. And some of the documents were  
21 under subpoena, and it turned out some of them  
22 apparently weren't turned over to various courts, and

23 they immediately turned them over so they got their  
24 hands on them. So lots of other things of that nature.  
25 So they spent three or four months studying them, and I  
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2400

1 never saw them. They studied them, and then we had a  
2 meeting and they told me -- you know, gave me some  
3 briefings approximately what was in the documents.  
4 Q Over what period of time after the Kasowitz  
5 firm finished their review of the company documents,  
6 over what period of time did they advise you about what  
7 they had found?  
8 A It was just off and on, various periods of  
9 time. I mean, again, you know, it was just obvious what  
10 they had found not to be -- that things were not right,  
11 and it was absurd to keep going on saying smoking is not  
12 addictive. It was absurd to keep saying smoking doesn't  
13 cause any problems, and people were still getting up  
14 saying that. So since I heard all of this, I said, This  
15 is ridiculous. We have got to settle these lawsuits,  
16 and let's do the right thing now.  
17 Q When you got this advice from the Kasowitz,  
18 Benson firm about what they had found in the documents,  
19 what did you instruct them to do?  
20 A To immediately call -- like I said, Don  
21 Barrett and to Mike Moore, one of the attorneys general,  
22 and said, Let's talk about a global settlement here and  
23 see if they can negotiate something and make some sense  
24 and do the right thing. And we started negotiations.  
25 This is now September/October time period of '96.

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1 Q When you say "do the right thing," what do  
2 you mean?  
3 A I mean settle and disclose everything.  
4 Q Because?  
5 A Because it's absurd. The industry's position  
6 for 40 years to me was totally absurd. It just  
7 confirmed what I suspected. I now had confirmation of  
8 what I suspected six months earlier, and I wanted to  
9 complete the process.  
10 Q And you suspected six months earlier that  
11 these things had been known all along?  
12 A Yes.  
13 Q By all of the companies?  
14 A Yes.  
15 Q And that they hadn't disclosed it?  
16 A That's correct.  
17 Q And you were going to set about to disclose  
18 it?  
19 A That's correct.  
20 Q Would you describe yourself as a man of  
21 conscience?  
22 A I would hope so.  
23 Q And it was in that spirit that you made the  
24 decision to enter into talks with the other side in  
25 these cases?

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1 A Let me just be frank. I think it's that  
2 spirit and also the spirit of, you know, of being an  
3 economic -- being an economic person and trying to  
4 protect my company, which I have to do too. So, those  
5 two issues together, you know, made sense. I mean,  
6 knowing now from the Kasowitz firm what's in these  
7 documents, I mean, how could you go forward any other  
8 way?

9 I couldn't understand how anyone could. I  
10 mean, to this day I don't understand how these people  
11 are still standing up and saying smoking is not  
12 addictive, smoking doesn't cause problems, and they are  
13 doing it as we sit here and talk about it. I'm just  
14 reading about it in various trials and things right now  
15 saying the same thing. To me it's still absurd.

16 Q One of your motives was to save Liggett, if  
17 you could?

18 A That's correct.

19 Q And that's because the cases that were filed  
20 against Liggett posed a real threat?

21 A As I said, Liggett could not afford to lose  
22 any one case. Making it even worse, Liggett could not  
23 even post a bond to appeal a case. If we lose it, we  
24 couldn't go to appeals court. The other tobacco  
25 companies would write a check and post a bond and appeal

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1 to the Supreme Court. We couldn't even afford to do  
2 that.

3 Q So once you gave the instructions to the  
4 Kasowitz firm to talk further, what happened next?

5 A We did have some meetings with the Attorneys  
6 General and, you know, and the various plaintiff  
7 attorneys. A series of meetings in October, November,  
8 December, back and forth trying to negotiate this thing,  
9 and we had new agreements starting to come together.

10 Q And a further agreement was made in March of  
11 1997; isn't that true?

12 A That's correct.

13 Q And that agreement provided in part for  
14 financial terms, payments by Liggett?

15 A That's correct.

16 Q And it provided certain nonfinancial terms?

17 A That's correct.

18 Q The financial terms were necessary for  
19 Liggett to survive?

20 A That's correct.

21 Q One of the agreements that you made was to  
22 issue a public statement?

23 A That's correct.

24 Q And in that public statement you personally  
25 said smoking is addictive?

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1 A That's correct.

2 Q And the industry knew it?

3 A Correct.

4 Q You said smoking causes health problems?  
5 A Yes.  
6 Q And the industry knew it?  
7 A Yes.  
8 Q As you look back, Mr. LeBow, on the  
9 disclosures you made and what the public stance of the  
10 industry has been about smoking and health and  
11 addiction, do you have an understanding as to why the  
12 industry took the positions for 40 years that it has?  
13 A Yes. It's pretty obvious why.  
14 Q Why?  
15 A Well, they had these documents totally  
16 contrary. If these things ever came out, it would be  
17 devastating to them. I mean, they just haven't told the  
18 truth for the past 30, 40 years, and hiding their  
19 documents through their lawyers pretty much. The  
20 lawyers, they've been hiding them under the guise of  
21 attorney-client privilege, a lot of these devastating  
22 documents.  
23 Q On the question of nicotine being addictive,  
24 did you get an understanding that one of the industry  
25 positions was that smoking is a matter of free will and  
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1 free choice?  
2 A I heard that millions of times, yes.  
3 Q And did you understand that if nicotine was  
4 found to be addictive, that would contradict smoking as  
5 being a matter of free choice?  
6 A That's correct.  
7 Q Or that if nicotine was addictive, smoking  
8 was not a matter of free will any more?  
9 A That's correct.  
10 Q And if nicotine was addictive, maybe the  
11 personal responsibility of the smoker would be somewhat  
12 in doubt because he is addicted?  
13 A That's correct.  
14 Q On the question of smoking and health, or  
15 whether or not cigarettes cause disease, had you heard  
16 that the official position or stance of the industry was  
17 that there was doubt or a controversy about whether  
18 cigarettes cause disease?  
19 A I heard. I never believed it for one minute.  
20 Q Did you make the admissions that you did  
21 because it was time to stop the denials?  
22 A Yes. Absolutely.  
23 Q Mr. LeBow, with respect to the testimony that  
24 you have given in this matter both yesterday and today,  
25 will you agree that that testimony can be made public?  
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2406

1 A Yes, absolutely.  
2 Q All right. You have no objection to letting  
3 the public know what's been said here over the course of  
4 the last two days?  
5 A I have no objection.  
6 Q Of any kind?  
7 A Of any kind.  
8 Q Thank you, sir. That's all I have.

9 MS. HARTLEY: Your Honor, this would be a  
10 good time to break.  
11 THE COURT: Approach the side bar and turn  
12 the lights on. We don't need the reporter.  
13 (Side bar, court and counsel.  
14 THE COURT: All right. Ladies and gentlemen,  
15 we are going to take the lunch recess at this point. I  
16 am going to ask that you be back in the jury room at  
17 1:15 because it was a little over an hour. So, please,  
18 do not discuss the case among yourselves or with anyone  
19 else. We'll try to start right at 1:15.  
20 THE BAILIFF: Court recessed until 1:15.  
21 (The jury exits courtroom; discussion off  
22 record and recess)  
23 (Change of reporters, 12:10 p.m.)  
24  
25

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2407

1 IN THE CIRCUIT COURT, FOURTH  
2 JUDICIAL CIRCUIT, IN AND FOR  
3 DUVAL COUNTY, FLORIDA  
4 CASE NO.: 97-03522-CA  
5  
6 DIVISION: CV-H  
7  
8 ANGELA B. WIDDICK, as Personal  
9 Representative of the Estate of  
10 ROLAND E. MADDOX, deceased,  
11  
12 Plaintiff,  
13  
14 vs.  
15  
16 BROWN & WILLIAMSON TOBACCO  
17 CORPORATION, a foreign corporation;  
18 LIGGETT GROUP, INC., a foreign  
19 corporation; and WINN-DIXIE STORES,  
20 INC., a Florida corporation,  
21  
22 Defendants.

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16 AFTERNOON SESSION  
17 MAY 21, 1998  
18 VOLUME IX  
19  
20

21  
22  
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2408

1 (Proceedings held in chambers)

2 MR. NYHAN: The portion of the LeBow tape  
3 that was played over our objection referred to  
4 settlement by Liggett of litigation. And in light  
5 of the record that Your Honor has already made with  
6 respect to jurors in this case having overheard talk  
7 of Liggett having settled this case and having been  
8 dismissed from this case when they were in the hall  
9 outside, I believe, it was after Mr. Howell and the  
10 lawyer from the Kasowitz firm had been introduced to  
11 the jury.

12 Later that day, on Monday, the 11th, one  
13 of the jurors in the second panel reported that  
14 while all the jurors were in the hall about 1:30 in  
15 the afternoon, they overheard an ABC news reporter  
16 on a cell telephone reporting that Liggett had  
17 settled this case and had been dismissed from this  
18 case.

19 That coupled with the fact that Your Honor  
20 allowed plaintiffs to play a portion of the LeBow  
21 testimony to which we objected concerning his  
22 settlement of cases, it wasn't clear exactly which

23 ones they were, we move for a mistrial; and also on  
24 the ground of Florida Statute 768.041 prohibits a  
25 party from introducing evidence of a settlement

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1 before a case pending in trial.

2 THE COURT: Let me make sure the record is  
3 clear about something. I don't remember that that  
4 was one of the areas we talked about on the LeBow  
5 deposition. Now, maybe it's just my faulty memory,  
6 but I don't remember specifically --

7 MR. NYHAN: We objected --

8 THE COURT: -- reading the part about the  
9 settlement when we were going over the specific  
10 objections. Now, I know you have an overall  
11 objection to Mr. LeBow's testimony, period, but I  
12 thought that that part was an agreed upon portion of  
13 the trial. Is that inaccurate?

14 MR. MATTHEWS: Judge, I'm not sure, and I  
15 can get Greg down here to ascertain that. But be  
16 that as it may, I don't think that that's even  
17 controlling because obviously part of the motivation  
18 as Mr. LeBow testified about was the settlement of  
19 other cases.

20 That deposition was obviously taken long  
21 before this trial ever started. It was not even  
22 taken in this case. So I don't think the statute  
23 that Mr. Nyhan is setting goes to that issue at  
24 all. It would have come up on cross-examination  
25 anyway.



1           So I think this is just a stab in the  
2   dark, Judge, to try to get a mistrial when there is  
3   none there. The issue about the other settlement  
4   was handled, was taken care of, and I see no basis  
5   for this.

6           THE COURT: Well, I guess my concern is  
7   that you had -- I did not -- I guess I was given  
8   the opportunity to read all of the deposition and to  
9   make a decision based on the entire deposition,  
10   Mr. Nyhan. I'm trying to be fair to everybody when  
11   I'm speaking on the record, but -- and otherwise.

12           But I was under the impression that once I  
13   determined that portions of Mr. LeBow's deposition  
14   would be read, then there was an attempt to work out  
15   which portions. And I went through line by line  
16   many of the portions that were supposed to be  
17   objectionable to one side or the other.

18           And since I just did that, I believe,  
19   yesterday or the day before, I don't remember that  
20   portion which I saw on Mr. LeBow's deposition  
21   talking about that's why he determined to settle and  
22   everything else.

23           I do remember saying to do the right thing  
24   and there was a portion of that about do the right  
25   thing, you know, try to settle a case. I don't

1 remember any of the passages about, I talked to one  
2 of the Attorney General's of the states in that case  
3 and I -- you know, we attempted to work out a  
4 settlement and everything else.

5 I don't know how I would have ruled on  
6 that. In fact, I think I might have had excluded  
7 it, but I was under the impression that that was not  
8 offensive to your side, assuming the fact that the  
9 overall deposition was objected to, that that was  
10 not a particular portion that was going to be  
11 objected to in view of the fact I was going to let  
12 some of it in.

13 MR. NYHAN: We did object, specifically,  
14 to page 77, line 13; page 78 line 10. And part of  
15 that material was allowed. In any event, Your  
16 Honor, we make the motion and --

17 THE COURT: I think there's already a  
18 record of it. We don't need to go back and look  
19 over it. I'll deny the motion at this point.

20 MR. NYHAN: Thank you, Your Honor.

21 MR. MATTHEWS: Thank you, Judge. We're  
22 ready to queue the next part.

23 MR. NYHAN: Now we have to play the  
24 cross-examination addressing that issue of that  
25 motion.

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1 THE COURT: You've already gone over it to

2 make sure it comports to what we've agreed to.

3 MR. NYHAN: Yes.

4 MR. MATTHEWS: This one runs about an hour

5 and 46 minutes, Judge, just to let you know.

6 THE COURT: All right. Off the record.

7 (Proceedings in chambers concluded at 1:25

8 p.m.)

9 (Proceedings resumed, jury absent)

10 THE COURT: All right. Are you ready to

11 proceed, Ms. Hartley?

12 MS. HARTLEY: Yes, Your Honor.

13 MR. NYHAN: Yes, Your Honor, we are. Your

14 Honor, if I might, there's a natural break point an

15 hour into this.

16 THE COURT: Let's go ahead and do that.

17 MR. NYHAN: I would recommend when we get

18 to that point, we ask for a five-minute stretch.

19 MR. MATTHEWS: Where is that so I can have

20 an idea?

21 MR. NYHAN: It's page 284.

22 MR. MATTHEWS: Line 1?

23 MR. MATTHEWS: Yeah, it stops at line 2,

24 That's still correct; is that right?

25 THE COURT: Is that a problem,

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2413

1 Mr. Matthews?

2 MR. MATTHEWS: No, Your Honor.

3 THE COURT: Okay. Bring them in please.

4 (Jury enters courtroom)

5 THE COURT: Good afternoon, ladies and  
6 gentlemen. Again, I apologize to you for keeping  
7 you back there during that time period, but we were  
8 working and there was something that we had to do.  
9 So, please bear with us.

10 You're ready to proceed, Mr. Nyhan?

11 MR. NYHAN: Yes, Your Honor. At this  
12 point, we'd like to play the cross-examination of  
13 Mr. LeBow.

14 (Resume playing of videotape)

15 Q And your hope in settling that lawsuit was  
16 to buy your peace from these Attorneys General  
17 actions to the extent you --

18 MR. NYHAN: No, that's right. I just want  
19 to get the volume right.

20 MS. HARTLEY: All right.

21 A It wasn't a hope. That was the  
22 arrangement.

23 Q In addition to buying your peace, you also  
24 had provisions included in that agreement that gave  
25 you the hope of furthering an interest obtaining an

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2414

1 ownership interest in R. J. Reynolds Tobacco Company  
2 or some other tobacco company, didn't you?

3 A I don't know how that would work.

4 Q Did you have any provisions in the  
5 agreement, Mr. LeBow, with respect to what happened  
6 if Liggett and Brook and/or Brook merged with

7 another tobacco company?

8 A Yes.

9 Q What are those provisions?

10 A I think they speak for themselves.

11 Q Do you recall what they were?

12 A Some of them.

13 Q Well, let's turn to the agreement itself.

14 A Okay. Please do.

15 Q I'll be glad to. Let me have this marked

16 as the next exhibit. Let me show you the document,

17 nonetheless, Mr. LeBow, and ask you to look at what

18 is shown here at paragraph 17.

19 Tell me if what is shown there as

20 paragraph 17 is what you recall being, in substance,

21 paragraph 17 and the agreement you signed?

22 A I have no way of knowing if it's in

23 substance, everything. It doesn't look the same, so

24 I just don't know.

25 Q Would you read it, please, sir.

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2415

1 A The whole paragraph 17?

2 Q Yes, please.

3 A That's going to take us about -- a while.

4 All right. Paragraph 17. Future affiliates --

5 affiliate. 17.1.

6 Q You can read it. All I'm asking you to do

7 is read it to yourself?

8 A I'm sorry.

9 Q You're welcome to read it out loud.

10 A No, no, no, I thought you meant read it  
11 out loud. Okay. I've read something similar to  
12 this in the actual agreement before. I'm somewhat  
13 familiar with what's in here.

14 Q Do you agree that the agreement, as  
15 signed, had provisions in it that dealt with what  
16 happened to future affiliates of Liggett or Brook?

17 SPEAKER: Objection.

18 Q Do you also agree that the agreement had  
19 in it provisions that defined an affiliate and  
20 future affiliate?

21 A Yes, they're defined.

22 Q Let me turn you to a page that appears to  
23 have a definition of future affiliate and ask you to  
24 look at that definition.

25 And my question to you as you read it,

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2416

1 does that appear to be the definition of future  
2 affiliate as what's included in the agreement?

3 A It appears to be.

4 Q Now, sir, in looking at that definition,  
5 it says, does it not, that "future affiliate" means  
6 any one entity other than an entity with a market  
7 share greater than 30 percent as of the date of this  
8 agreement?

9 A That's what it says.

10 SPEAKER: Objection.

11 Q That includes Philip Morris, doesn't it?

12 A Yes.

13 Q Which is a nonsettling tobacco company?

14 A Correct.

15 Q So a future affiliate is a nonsettling

16 tobacco company --

17 A Correct.

18 Q -- which has less than 30 percent of the

19 market share?

20 A That's what it says.

21 Q So it could include, could it not, R. J.

22 Reynolds Tobacco Company as well as RJR Nabisco?

23 A It could, yes.

24 Q In any event, you agreed earlier that --

25 A Wait a minute, say that again, that

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1 question again. It could include what?

2 Q Either R. J. Reynolds Tobacco Company or

3 RJR Nabisco.

4 A Yes, I suppose so.

5 Q Provision 17.4 provides, does it not, that

6 in the event of a merger of companies such as Brook

7 and Liggett and RJR Nabisco, if that occurs one of

8 the -- and one of the settling states, which would

9 include Minnesota, Mississippi, other states --

10 A Right.

11 Q -- one of the concerns that Liggett had

12 was the possibility of posting a bond -- a problem

13 of posting a bond in the event of an adverse

14 verdict.

15 A Correct.

16 Q And it was your understanding that various  
17 tobacco companies had that concern?

18 SPEAKER: Objection.

19 A No, I didn't have that understanding. I  
20 thought that depends on the size of the bond. They  
21 could easily post a bond.

22 Q Are you saying to this jury hearing this  
23 case that there is no advantage to a tobacco company  
24 anywhere in obtaining the benefit of not having to  
25 post a bond if they get hit for several hundred --

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1 for several billion dollars in a case?

2 A No, I obviously I can't say that.

3 Q In fact, the provision was put in here as  
4 to give such a company an incentive to merge with  
5 Liggett and Brook?

6 A If they so desired, yes.

7 Q Now, to that extent, the agreement, apart  
8 from buying your peace, created an opportunity for a  
9 merger with another company; isn't that correct?

10 A Only if they they were guilty. Because if  
11 they didn't lose a case, it was worthless.

12 Q Mr. LeBow, if a company was hit for a  
13 substantial judgment in a trial court and wished to  
14 pursue its appellate rights, in order to avoid  
15 posting a bond, there was an incentive for that  
16 company to merge with your company, wasn't there?



17           A     Yes. But I don't think it's that much of  
18 an incentive in this case.

19           Q     Did the Attorneys General insist on that  
20 provision going in the agreement or did you insist  
21 on it?

22           A     I insisted on it.

23           Q     Throughout the afternoon, you have  
24 referred repeatedly to information you obtained from  
25 the Kasowitz law firm; is that right?

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1           A     That's correct.

2           Q     What documents have you reviewed in this  
3 process?

4           A     I merely reviewed those released by the  
5 state of Florida -- by the courts in Florida, I  
6 should say, not the state of Florida but the courts  
7 in Florida.

8           Q     How many documents was that?

9           A     I believe eight.

10          Q     So the record is clear, those are all the  
11 documents you have reviewed with respect to tobacco  
12 company liability issues?

13          A     Personally reviewed, yes.

14          Q     Everything else that you testified about  
15 and the information provided to you was information  
16 that someone orally articulated to you?

17          A     Yes.

18          Q     And it's from what they told you based on

19 what they told you they had seen in documents  
20 prepared by others?

21 A Prepared by others meaning what?

22 Q Not themselves?

23 SPEAKER: Objection.

24 A Oh, yes.

25 Q Except for the information you obtained

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1 from them and the eight documents you reviewed from  
2 Florida, your knowledge about such issues as whether  
3 cigarettes caused disease, whether cigarettes are  
4 addictive, and whether the tobacco companies have  
5 misled the public is the same now as it was in 1994?

6 A Well, it's also all the popular, you know,  
7 documents that have been out in the public areas.  
8 There's a lot of documents that have been released  
9 publicly -- Brown & Williamson documents and many of  
10 those documents which have -- there have been many,  
11 many stories and articles about et cetera, et  
12 cetera. So there's a combination of all those  
13 things. It's not just one lawyer telling me one  
14 thing.

15 Q So you've got what the lawyers told you  
16 and what you've read in the popular press?

17 A That's correct. And what I personally  
18 believe.

19 Q And what you personally believe is based  
20 on what you believed in 1993 and '94, plus what the  
21 lawyers told you and what you read in the popular

22 press?

23 A Correct.

24 Q Now, when you said these documents that

25 have come out from other companies -- and when you

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1 refer to documents that have come out from other  
2 companies, you were referring in your instance to  
3 what you saw in the way of summaries and newspaper  
4 articles and magazine articles about those  
5 documents, correct?

6 A A couple of them, I may have -- on the  
7 Internet, read a couple of them. But mostly  
8 summaries. I agree with that.

9 Q Do you remember which two you read on the  
10 Internet?

11 A No, I don't remember.

12 Q What percentage of your assets, your  
13 personal assets are tied up in Brook Group?

14 A 75 percent.

15 Q And the other 25 percent is tied up in  
16 what?

17 A Various digresses. I don't think I should  
18 have to -- I don't know what the relevance of this  
19 is.

20 Q Does it have anything to do with the  
21 tobacco industry at all?

22 A No, none whatsoever.

23 Q What percentage of Brook Group's income is

24 from the -- is from Liggett?

25 A Brook Group is losing money.

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1 Q Is Liggett also losing money?

2 A At the present time, yes.

3 Q In fact, does Liggett have a negative book  
4 value at present?

5 A Yes.

6 Q Is the negative book value approximately  
7 \$150 million?

8 A It could be higher. I'm not sure, but it  
9 could be around there.

10 Q When you acquired Liggett -- by "you," I  
11 mean Brook Group acquired Liggett -- what percentage  
12 of the cigarette market did Liggett have?

13 A I think around 3-1/2 percent.

14 Q When you last checked, what percentage of  
15 the cigarette market did Liggett have?

16 A Last year, it was close to 2 percent.

17 Q Do you have certain long-term obligations  
18 coming due to Brook Group and to Liggett?

19 A To Liggett, we do.

20 Q What are those?

21 A There are some bonds coming due; some in  
22 January and some a year from January.

23 Q Is Liggett presently able to pay what it  
24 owes on those bonds?

25 A No.

1 Q Have you undertaken efforts to obtain any  
2 delay or relief from those bonds?

3 A We've had negotiations, but they have not  
4 been successful yet.

5 Q Why did you originally acquire Liggett?

6 A It was a financial transaction at the  
7 time.

8 Q And did you acquire Liggett or -- that is  
9 you, Brook Group, acquired Liggett essentially  
10 through junk bonds?

11 A Short-term, high-yield bonds, yes.

12 Q Is that what some people would refer to as  
13 "junk bonds"?

14 A No, short-term bonds. They were somewhat  
15 different, not really what people would call junk  
16 bonds.

17 Q The transaction with Liggett occurred in  
18 1996 -- 1986; is that right?

19 A Correct.

20 Q And from 1986 until 1995, you essentially  
21 had control of Liggett, didn't you?

22 A Through Brook, yes.

23 Q As CEO of Brook, you, nonetheless, had  
24 access to whatever information you requested  
25 concerning the operations of Liggett, didn't you?

1           A     Yes, as any director would also, as any  
2 director has access to any information he wants.

3           Q     As a director and as a majority  
4 shareholder of Brook which owned Liggett, you were  
5 aware of controversies concerning smoking and  
6 health, weren't you?

7           A     I was aware of various litigation going  
8 on, yes.

9           Q     And you were aware of public health  
10 controversies concerning smoking and health, weren't  
11 you?

12          A     Yes.

13          Q     You had access to whatever information  
14 Liggett possessed during that time period as to  
15 whether cigarettes caused disease, didn't you?

16          A     I, at all times, had access to everything,  
17 all of it.

18          Q     Did Liggett have scientists?

19          A     Years ago.

20          Q     Does Liggett have scientists now?

21          A     They have a research group. When you say  
22 "scientists," scientists in what areas?

23          Q     What do you mean by research people?

24          A     These are people that pretty much just do  
25 the formulations of tobacco, various, you know,

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1 cigarettes. That's all we do right now.

2           Q     Did you know Mr. Dietz who testified

3 earlier here today?

4 A I don't know him, no. I may have met him  
5 once. I wouldn't know him if I saw him.

6 Q You did indicate, didn't you, that you've  
7 taken more of an interest in the health issues that  
8 Liggett faces since 1995?

9 A In the past couple of years, yes.

10 Q And you are aware, are you not, that  
11 Liggett was required to produce today an individual  
12 who was most knowledgeable in the company about  
13 certain scientific issues?

14 A I just found that out a few minutes ago.  
15 I didn't know that before, you know, half an hour  
16 ago.

17 Q And until half an hour ago, you did not  
18 know that that individual existed in the company and  
19 was named Dietz, did you?

20 A What's the question again? What type of  
21 individual? I know we had research people, if  
22 that's what you mean. Whether his name is Dietz,  
23 there are a bunch of research people. Who they are,  
24 I don't know.

25 Q Are you telling this jury from the time

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1 period of 1986 all the way up to a half hour ago, as  
2 CEO of Brook, as a majority shareholder of Brook  
3 which owned Liggett, and as a director of Liggett,  
4 that you did not know whether the company had

5 scientists -- whether you called them researchers or  
6 not -- that knew something about smoking and health?

7 A That's correct.

8 Q Does it surprise you, given your roles  
9 with Liggett, that an individual was designated and  
10 appeared here today who described himself as the  
11 manager of scientific issues and said he had held  
12 that position since 1990?

13 A I have nothing to say. I have no idea who  
14 he is. I've never met him. I know we have a  
15 research department that does research into the  
16 issues of tobacco -- not health issues, per se.

17 We have no scientists to my knowledge that  
18 do any research into smoking and health issues  
19 together.

20 Q Can you name any of the scientists that  
21 have served in management roles at Liggett since you  
22 have been involved in the company?

23 A I can't name since I've been involved or  
24 before I was involved. No, I cannot.

25 Q Can you recall ever having a conversation

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1 with any scientist in the company?

2 A I had conversations the past few months  
3 about disclosing ingredients to the state of  
4 Massachusetts. That, I've had. That's basically  
5 it.

6 And some issues about tobacco, talking  
7 about, you know, the issues of tobacco, getting just



8 involved in the formulations of various cigarettes.

9 Other than that, no.

10 Q You told us earlier that you came to  
11 distrust your in-house legal counsel and your  
12 long-time outside legal counsel, that is,  
13 Liggett's.

14 Did you ever consider going and talking to  
15 any of the scientists in the company?

16 A No.

17 Q Did you consider ever going to the  
18 presidents of the company and asking them for  
19 information about smoking issues?

20 A The previous presidents?

21 Q Yes, any of them from 1986 until now.

22 A Absolutely not.

23 Q Did you ever consider going to any of them  
24 and asking them to instruct the appropriate  
25 scientists or other persons within the company to

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1 meet with you concerning issues of smoking and  
2 health?

3 A No, I did not.

4 Q Did you ever inquire of anyone within the  
5 company as to whether any safer products could be  
6 made?

7 A A few months ago, I talked to the current  
8 president about this issue, about something Liggett  
9 did ten years ago.

10 Q That was Mr. Fulford?

11 A Correct.

12 Q Other than that one conversation, did you

13 ever talk with a president of the company or any

14 officer of the company about whether safer products

15 were available?

16 A We may have had conversations, you know,

17 years ago. I don't recall. It's possible.

18 Q When you say it's possible, are you saying

19 you recall some or you don't recall some?

20 A Again, I remember something about this

21 palladium thing years ago, just having a brief

22 conversation.

23 Q The palladium issue was before your time,

24 wasn't it?

25 A I think so, yes.

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1 Q Did you ever talk with any officer,

2 director or scientist in the company about whether

3 any safer products were available during the time

4 period that you were involved with Liggett in '86 to

5 '97?

6 A No.

7 Q Did you ever talk with any officer, any

8 director or any scientist at the company with

9 respect to whether cigarettes are addictive?

10 A No.

11 Q Would you agree that scientists within the

12 company that deal with smoke chemistry and other

13 issues relating to smoke, would know more about  
14 smoking and health and addiction issues than you?  
15 A Not necessarily.  
16 Q Are you a scientist?  
17 A No.  
18 Q Apart from your work in engineering -- I  
19 believe you said electrical engineering --  
20 A Uh-huh (affirmative).  
21 Q -- do you have any other science training?  
22 A No.  
23 Q Do you consider yourself to be an expert  
24 in chemistry?  
25 A No.

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1 Q Do you consider yourself to be an expert  
2 in epidemiology?  
3 A No.  
4 Q Did you consider yourself to be an expert  
5 in toxicology?  
6 A No.  
7 Q Did you tell us recently in a  
8 deposition -- in a deposition that you didn't even  
9 know what toxicology was?  
10 A I may have.  
11 Q Is that correct?  
12 A Roughly, yes.  
13 Q Is one reason that you didn't over all  
14 those years inquire of anyone within the company

15 that you believed that the officers and the  
16 directors and the scientists where doing their best  
17 with respect to the operations of the company?

18 A Respect to which -- all these, every  
19 officer and director?

20 Q Yes.

21 A No, some I fired, and some I got rid of  
22 years ago.

23 Q Except for the ones you fired, did you  
24 have a basic belief that all of the employees of  
25 Liggett were trying -- were people of integrity

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1 trying to do the best they could in their jobs?

2 A From what they were telling me, from the  
3 information I had, obviously, yes. Otherwise, they  
4 would not have stayed.

5 Q Did you fire anyone because of smoking and  
6 health issues?

7 A No.

8 Q Did you fire anyone because of addiction  
9 issues?

10 A No.

11 Q Did you fire anyone over a concern about  
12 whether they were working hard enough to develop a  
13 safer product?

14 A No.

15 Q Did you fire anyone as a result of any  
16 concern you had as to whether Liggett was doing the,  
17 quote, responsible thing with respect to public

18 health issues?

19 A I think they fired me; they left.

20 Q You're referring to the lawyers?

21 A Yes.

22 Q Did you fire anyone?

23 A No, not that I recall.

24 Q Lawyers or anyone else over those issues?

25 A No, I said they left.

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1 Q I believe you indicated that the first  
2 president of the company -- the first president of  
3 the company was K. V. Dey?

4 A That is correct.

5 Q And he was followed by James Turner?

6 A Correct. You said Turner. I never said  
7 Turner.

8 Q You changed that in case I did say it  
9 wrong. Was Mr. Turner followed by Spencer Volk?

10 A Volk. No. It was Mr. Dey, then  
11 Mr. Turner, then Mr. Volk; that order.

12 Q And then Horrigan?

13 A Then we had an interim period where Volk  
14 left where it was me and Ressler and Chakalian were,  
15 like, copresidents for a few months. And then  
16 Mr. Horrigan.

17 Q Then Mr. Chakalian?

18 A Then Mr. Chakalian, right.

19 Q And now Mr. Volk?

20           A     No.  There was Mr. Cummings in between  
21     there for a while.

22           Q     Did you have an opinion with respect to  
23     whether cigarettes were addictive at that time?

24           A     In 1996?

25           Q     Yes.

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1                   SPEAKER:  Objection.

2           A     I hadn't thought about it that much.

3           Q     Do you know the difference between  
4     addiction and dependence?

5           A     No.

6           Q     Do you know the difference between  
7     addiction and habituation?

8                   SPEAKER:  Objection.

9           A     No.

10          Q     Do you know the difference between the  
11     Surgeon General's definition of addiction in 1964  
12     and the definition that emerged in the 1980s?

13          A     No, I do not.

14          Q     Did you see Mr. Horrigan's testimony  
15     before Congress in 1994?

16          A     Yes, I did.

17          Q     Did you make any attempt to contact the  
18     media or Congress at that time and denounce his  
19     position?

20          A     No, I did not.

21          Q     Did you discuss his position with him?

22          A     No.

23           Q     Mr. LeBow, let's begin with a few more  
24     questions about Liggett's financial situation.  
25                     Let me hand you what has been marked as

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1     LeBow Exhibit No. 1362 and ask you if you can  
2     identify that document, please, sir.

3           A     It's a Form 10-Q for June 30th, 1997,  
4     filed with the FCC.

5           Q     Is that the Form 10-Q filed by Liggett?

6           A     Yes.

7           Q     Could you tell the jury what a 10-Q is?

8           A     It's a result of financial condition of  
9     the company that we file with the FCC every quarter.

10          Q     Who prepares that document?

11          A     It's prepared internally by the Liggett  
12     people.

13          Q     In the normal course of business, do you  
14     see the document before it is submitted?

15          A     Not in the normal course of business, not  
16     normally, no.

17          Q     Do you at some point, typically, review  
18     the documents?

19          A     Sometimes, but not every time.

20          Q     Is it important that the information in  
21     the documents be accurate?

22          A     Yes.

23          Q     Why is it important?

24          A     Well, that's all we do is report the

25 accurate information.

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1 Q Are there laws that require companies to  
2 report that information accurately?

3 A Yes.

4 Q And my question, Mr. LeBow, is whether --  
5 there's a section on page 11 entitled Notice to  
6 Consolidate a Financial Statement?

7 A Yes, there is a section headlined that.

8 Q What is that section intended to do in the  
9 Form 10-Q?

10 A It's to give more information about the  
11 financial state.

12 Q Under the note No. 1, would you hand me  
13 back the document?

14 Is there a sentence that begins at the  
15 bottom of page 11 and continues onto page 12 and,  
16 indeed, is part of a paragraph that ends on page 12?

17 A That's pretty obvious. Why do you ask me  
18 a question like that? There's a sentence there,  
19 sentence there, paragraph there.

20 Q Would you read that paragraph, please,  
21 sir, for the record? In other words, read it out  
22 loud?

23 A Read it out loud?

24 Q Yes.

25 A "The company consolidated financial

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1 statements have been prepared assuming the company  
2 will continue as a growing concern. Liggett had net  
3 capital deficiency of 178 million, six-six-six-zero  
4 as of June 30th, '97, is highly leveraged, has  
5 substantial near term debt service requirements.

6 "Due to the many risk uncertainties  
7 associated with the cigarette industry and the  
8 impact of the tobacco --

9 REPORTER: I'm sorry. You'll have to slow  
10 down?

11 A I'm sorry. "Due to the many risks and  
12 uncertainties associated with the cigarette industry  
13 and the impact of tobacco litigation, quote --  
14 paren, rather, see note eight, end paren. There can  
15 be no assurance the company will be able to meet  
16 it's future earnings or cash flow calls.

17 "Consequently, the company could be in  
18 violation of certain debt covenants, and if it's  
19 lenders were to act on their acceleration rights on  
20 its revolving credit facility, in paren, the  
21 facility, end paren, or the indenture for its senior  
22 secured notes, paren, the Liggett notes, end paren,  
23 or refuse to lend under the facility, the company  
24 would not be able to satisfy such demands or its  
25 working capital requirements."

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1 Q And I believe you told us yesterday  
2 Mr. LeBow, that you're in the process of trying to  
3 renegotiate some of those arrangements?  
4 A Correct.  
5 Q But have not yet been successful in doing  
6 so?  
7 A That's correct.  
8 Q Is there a sentence that begins at the  
9 bottom of that page that tells what happens in the  
10 event that you are unsuccessful?  
11 A Yes.  
12 Q What does that sentence say?  
13 A The whole paragraph here?  
14 Q What does the paragraph say?  
15 A You want me to read it?  
16 Q Yes.  
17 A "The failure to pay interest on Liggett  
18 notes would permit the lenders of the facility to  
19 cease making further --  
20 REPORTER: I'm sorry. You have to slow  
21 down?  
22 A I'm sorry. "Would permit the lenders  
23 under the Facility, capital F, to cease making  
24 further advances. While the lenders have continued  
25 to make advances and management currently

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1 anticipates that they will continue to do so, no  
2 assurances can be given in this regard.  
3 "The company is unable to restructure the

4 terms of Liggett notes, extend the facility or  
5 otherwise make all payments thereon within the  
6 applicable grace periods, substantial to all its  
7 long-term debt, and the facility would be in  
8 default, and holders of such debt could accelerate  
9 the maturity of such debt.

10 "In such event, the company may be forced  
11 to seek protection from creditors under applicable  
12 laws."

13 Q Mr. LeBow, when it says you may be  
14 forced -- the company may be forced to seek  
15 protection from creditors under applicable laws,  
16 does that mean file bankruptcy?

17 SPEAKER: Objection.

18 A Possible reorganization.

19 Q Which is under the bankruptcy laws?

20 SPEAKER: Objection.

21 A In filing for reorganization, yes.

22 Q In filing for reorganization, do you do it  
23 under the bankruptcy laws?

24 A Yes.

25 SPEAKER: Objection.

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1 Q Now, the next sentence says what?

2 A "These matters raise substantial doubt  
3 about the company meeting its liquidity needs and  
4 its ability to continue as a going concern."

5 Q So the most recent 10-Q for Liggett

6 indicates, as a conclusion to the notes, that these  
7 matters raise substantial doubt about the company  
8 meeting its liquidity needs and it's ability to  
9 continue as a going concern?

10 A Since our settlement in March 1996, our  
11 volume has fallen off significantly for pretty  
12 obvious reasons.

13 (Change of reporters, 2:00 p.m.)

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1 Q And has the volume continued to fall?

2 A It's stabilizing somewhat, yes.

3 Q But you're still very much in debt?

4 A The debt has not changed. We have been  
5 paying our interest on time, though. That was done  
6 on time. We are not in default on anything as of  
7 right now.

8 Q Let me show you now what we've marked as

9 LeBow Exhibit No. 1359. Let me show you, then,  
10 Exhibit -- LeBow Exhibit 1361.  
11 Is that exhibit, Mr. LeBow, a deposition  
12 of you taken on July 18, 1997?  
13 A Yes.  
14 Q Would you turn, please, Mr. LeBow, when  
15 you get your copy back from counsel to page 109.  
16 A Okay.  
17 Q Do you recall Mr. Grossman asking you in  
18 the deposition, Question, You waive all your  
19 privileges? And you answered, Liggett's privileges,  
20 yes.  
21 A That's what it says.  
22 Q Well, did you give that answer, that you  
23 recall?  
24 A Yes, I'm sure it's an accurate transcript.  
25 Q Did he then -- did he then ask, All of

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1 Liggett's privileges, and you answered yes?  
2 A Yes.  
3 Q And did he then ask, How about Brooks'  
4 privileges, and you answered and Brooks?  
5 A Yes.  
6 Q And then he asked you, did he not, are  
7 there any privileged lawyer documents that you have  
8 withheld from the Attorneys General, and you  
9 answered, Not to my knowledge?  
10 A Correct.

11 Q And then he asked, Are there any privileged  
12 Liggett documents that you have withheld from other  
13 plaintiffs in this litigation, and you answered,  
14 Yes. Other plaintiffs? What do you mean other  
15 plaintiffs? Is that correct?

16 A That's what it says.

17 Q And as best you can give me, do you have  
18 reason to doubt the accuracy of that question?

19 A No, I have no reason to doubt its accuracy.

20 Q Did he then ask, Plaintiffs with whom you  
21 haven't settled. And you answered, Yes, we have not  
22 waived our privilege, my understanding, for other  
23 plaintiffs.

24 Is that correct?

25 A That's correct.

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1 Q And he then asked, to be sure, So you have  
2 waived your privilege not as a matter of public  
3 health and not for the benefit of the public, but  
4 rather for purposes of the settlement; is that  
5 correct? And you answered, You know, I really don't  
6 know the answer to that. I have to think about  
7 that. Is that correct?

8 A Well, for example, I haven't raised --  
9 waived my privilege against RJR to you. You're a  
10 plaintiff in this case, that's for sure. I haven't  
11 waived my privilege to you.

12 Q Was that a correct reading of the question  
13 and answer?

14           A     Yes, it's a correct reading of what is on  
15 the deposition, yes.

16           Q     So the record is clear on this, you've told  
17 us about the general counsel of Brook talking to some  
18 counsel at Liggett. You've told us about  
19 conversations you've had with Mr. Murray.

20                     Did you ever have between 1985-'86 and  
21 1995, when you became suspicious, any conversations  
22 with any other inside legal counsel at Liggett?

23           A     No, I haven't. Mr. Murray was the only one  
24 I ever talked to.

25           Q     Apart from the one meeting you had with one

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1 of the outside counsel in connection with the  
2 deposition conducted by Mr. Rosenblatt, which I'll  
3 come back to in just a moment, apart from that  
4 occasion, did you have any meetings or telephone  
5 conversations with Mr. Kearney or Mr. Decker or  
6 anyone with Webster Sheffield or Mudge, Rose?

7           A     I may have met him once, you know, outside  
8 of Liggett at their offices. I guess maybe we're  
9 talking about the time they were leaving Webster,  
10 Sheffield going with Mudge, Rose just on a -- not on  
11 any detailed basis.

12           Q     Did you discuss smoking and health  
13 liability issues?

14           A     I don't recall. It's a long time ago we  
15 talked about it.

16 Q Did you receive written reports from them?  
17 A No.  
18 Q Is it fair to say that their dealings were  
19 with Liggett?  
20 A Correct.  
21 Q I believe you said in your earlier  
22 examination, correct me if I'm wrong, that there were  
23 two times you focused on smoking and health issues  
24 before 1995, when you became more concerned.  
25 One of those was a -- when you were deposed

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1 by Mr. Rosenblatt and another time was when  
2 Mr. Horrigan testified in Congress?  
3 A Correct.  
4 Q Now, at the time you were deposed by  
5 Mr. Rosenblatt, you met one of the outside counsel;  
6 is that right?  
7 A That's correct.  
8 Q Was it just one?  
9 A I believe so, yes.  
10 Q And do you recall which one it was?  
11 A Mr. Kearney, I believe.  
12 Q You said that Mr. Kearney talked with you  
13 about addiction?  
14 A Yes.  
15 Q And I believe you said that you told him  
16 that you were going to testify based on your personal  
17 opinion about addiction at that time?  
18 A Personal, yeah, history.



19 Q And, in fact, you testified in  
20 Mr. Rosenblatt's deposition about your personal  
21 history?

22 A Yes.

23 Q And your personal history was that you had  
24 smoked for a number of years and then you had quit?

25 A Correct.

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1 Q And once you had quit, you had never gone  
2 back?

3 A That's correct.

4 Q And you also indicated in that deposition  
5 that your personal opinion at that time was that  
6 cigarette smoking was not addictive?

7 A Based on my own -- upon my personal  
8 experience.

9 Q So Mr. Kearney, on that occasion, didn't  
10 put words in your mouth as to what to say with  
11 respect to addiction. You testified based on your  
12 personal basis?

13 A Well, he told me what the industry's  
14 position was, that it's never been proven, and so  
15 forth and so on. And, you know, I just said what I  
16 felt.

17 Q I believe you also said that Mr. Kearney  
18 talked to you about what the industry's position was  
19 on causation?

20 A Yes.

21 Q And by "causation" we mean whether smoking  
22 causes disease?  
23 A Correct.  
24 Q All right. Now, Mr. Kearney never told you  
25 to lie, did he?

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1 A Correct.  
2 Q You had a personal view at that time about  
3 whether cigarette smoking might cause disease, didn't  
4 you?  
5 A Correct.  
6 Q And it's the same as your personal view  
7 now?  
8 A Correct.  
9 Q But you were comfortable at that time with  
10 the idea that apart from your personal belief, based  
11 on statistics, that causation had not been proven  
12 scientifically, weren't you?  
13 A On a highly technical basis, one can come  
14 to that conclusion. That's very highly technical.  
15 Q Did you not say in the deposition, I don't  
16 know whether it causes --  
17 A Right. No, I said I don't know the answer  
18 to that.  
19 MR. BENSON: Objection.  
20 Q And you were comfortable with that answer  
21 at that time?  
22 A Well, Mr. Kearney yelling at me, "It's  
23 never been proven, never been proven," and I have my

24 other side telling me all the statistics. It seems  
25 to be pretty obvious that it has been proven, again,

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1 from a statistical point of view.

2 Now, if you want to get highly scientific  
3 and technical, I'm not prepared, I can't -- you know,  
4 I'm not a scientist. I can't get highly scientific  
5 and technical, so I decided to answer that question  
6 as I don't know.

7 Q And apart from the statistical relationship  
8 you still don't know, do you?

9 A Again, I'm not a scientist. I'm not going  
10 to answer a silly question like that.

11 Q Let me have -- show you this next exhibit,  
12 it's LeBow Exhibit No. 1660. It's the deposition of  
13 Bennett LeBow on Friday, November 5, 1993.

14 You indicated yesterday and some today your  
15 interest in public health; is that right?

16 A Yes.

17 Q In 1993, you weren't interested in public  
18 health, were you?

19 A I wasn't focused on it.

20 Q When Mr. Rosenblatt took your deposition,  
21 if you would turn to page 43 of that deposition, he  
22 asked you, did he not, at line 11, If I ask you, Does  
23 smoking cause lung cancer -- and you answered  
24 immediately, I don't know.

25 A I don't know how immediate it was. But it

1 says that here.

2 Q Well, it has the lines to indicate that the  
3 question wasn't complete. But in any event, he asked  
4 you the question, If I asked you, Does smoking cause  
5 lung cancer, you answered, I don't know?

6 A Yes.

7 Q And then he asked you, question, Okay, and  
8 you really don't care. Didn't he?

9 MR. BENSON: Objection.

10 A That's what it says.

11 Q He went on to say, Because you're selling a  
12 legal product; is that right?

13 A Yes.

14 Q And you answered, Correct?

15 A Well, "correct" refers to selling a legal  
16 product, not that I don't care.

17 Q You were only answering half of his  
18 question?

19 A That's apparently what I did, yes.

20 Q So at that time, it's your testimony -- so  
21 it's your testimony today that as of that time you  
22 weren't concerned?

23 A Yes.

24 Q Now, Mr. Murray had been general counsel of  
25 Liggett for 20 years?

1 A I don't know exactly how many years.

2 Q Well, do you recall it being for quite a  
3 period of time?

4 A Yes, quite a period of time.

5 Q And Webster, Sheffield, later Mudge Rose,  
6 the lawyers at least, had been the counsel for  
7 Liggett for 30 years?

8 A Many years. I don't know exactly how many.

9 Q And as far as you know, as far as you  
10 believed at that time, at least, all the information  
11 that Mr. Murray -- that you had requested of  
12 Mr. Murray, he had provided?

13 A To the best of my knowledge, at the time,  
14 yes.

15 Q And to the best of your knowledge at the  
16 time, the outside lawyers, Webster Sheffield, later  
17 Mudge Rose, had successfully defended all the cases  
18 up until that point?

19 A To the best of my knowledge, yes.

20 Q You never asked for any more information  
21 from anyone at the company that you didn't get?

22 A That's correct.

23 Q And no one in management at Liggett or at  
24 any level of the company, whether it was management  
25 or otherwise, ever came to you and expressed concerns

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1 about the company's position on smoking and health

2 issues?

3 A That's correct.

4 Q Now, against that background, I believe you  
5 said there were two reasons for concern that  
6 developed in September of '95.

7 A In my mind, yes.

8 Q Number one, you were approached by your  
9 outside counsel. I believe you said Mr. Kearney?

10 A No, not directly. I mean, through  
11 Mr. Murray.

12 Q Through Mr. Murray?

13 A Through him.

14 Q Okay. About the -- about their joining  
15 another firm?

16 A Correct.

17 Q And you understood from Mr. Murray that the  
18 reason they were joining another firm is because  
19 Mudge, Rose was collapsing?

20 A Correct.

21 Q And this core group of lawyers that had  
22 represented Liggett for maybe 30 years successfully  
23 needed a new home?

24 A That's correct.

25 Q And you were asked for your consent?

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1 A Correct.

2 Q And Mr. Murray had no problem with that  
3 request?

4 A What, asking me for my consent?

5 Q That's right.

6 A No, he had no problem with that.

7 Q And he had no problem with granting  
8 consent, if it were left to him, did he?

9 A He probably would have granted consent,  
10 absolutely. But it wasn't left to him.

11 Q What they wanted to do was join the firm of  
12 Latham & Watkins; is that correct?

13 A That's correct.

14 Q And Latham & Watkins was a very respected  
15 national law firm, wasn't it?

16 A I didn't know them that well.

17 Q You had no reason to doubt their abilities  
18 or integrity, did you?

19 A At the time, no.

20 Q Did you ask Mr. Murray his opinion about  
21 Latham & Watkins?

22 A No.

23 Q Did you ask your general counsel at Brook  
24 about that person's opinion concerning Latham &  
25 Watkins?

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1 A No.

2 Q Now, I believe you said you had tried to  
3 direct them, instead, to the Kasowitz firm?

4 A Correct.

5 Q Because you knew the senior partners of the  
6 firm?

7           A     Yes.

8           Q     And you knew them to be a products

9     liability firm?

10          A     That's correct.

11          Q     Who were the senior partners you knew?

12          A     Mr. Kasowitz and Mr. Friedman, at that

13     time.

14          Q     Let me show you --

15          A     And they had done a lot of work for me in

16     the past, the Kasowitz firm.

17          Q     Let me turn your attention to the

18     deposition Mr. Grossman took. If you'll hand me the

19     depositions, I'll tell you which exhibit number it

20     is. I believe it's Exhibit No. 1359.

21          A     Which one?

22          Q     1359.

23          A     Okay.

24          Q     Turn, please, to page 62, of that

25     deposition.

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1                    You were asked in that deposition, were you

2     not, Question, You are currently represented in

3     smoking and health matters by the Kasowitz Benson

4     firm, and you answered, That's correct; is that

5     right?

6           A     Yes.

7           Q     Then you were asked, Can you identify the

8     lawyers at Kasowitz and Benson with whom you're most

9     familiar? And you answered, Mr. Kasowitz, Mark



10 Kasowitz, and Mr. Dan Benson; is that right?

11 A That's right.

12 Q Then you were asked about Mr. Michael Faye

13 sitting near you, and you added, Michael Faye and

14 Aaron Marks; is that right?

15 A That's right.

16 Q And you were asked, And Ken Striker, and

17 you answered, And who? And the question was, Ken

18 Striker? And you answered, I don't know.

19 A Correct.

20 Q Then Mr. Faye said it was "Striker." The

21 question then was asked, The Kasowitz firm was a

22 long-time counsel for you in matters other than

23 smoking and health?

24 A Correct.

25 Q And you answered, No, didn't you?

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1 A That's correct.

2 Q And the question -- next question was, When

3 did they become your counsel? And you answered when

4 we initiated this first settlement back in '96; is

5 that correct?

6 A That's what it says.

7 Q And then you were asked, were you not, they

8 became your counsel sometime before the settlement,

9 they participated in the negotiations leading to the

10 settlement? And you answered, Yes, obviously; is

11 that right?

12 A Yes.

13 Q And then you were asked, were you not, And,  
14 in fact, you've been widely quoted as saying that  
15 as of December 7th, 1995, you had agreed to their  
16 proposal to negotiate on your behalf; is that  
17 correct?

18 And you answered, They came to me -- they  
19 came to me and asked me, you know, would I be  
20 interested in negotiating with the other -- with the  
21 plaintiffs and I said, Yes, in December of '95. That  
22 was the first time they were authorized to conduct  
23 negotiations. Is that correct?

24 A That's correct.

25 Q And then you were asked, were you not, And

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1 it was their proposal? And you answered, There was  
2 no proposal. It was just a proposal to negotiate.  
3 Is that the question? And then you were asked, Yes,  
4 it was their proposal to negotiate. And you  
5 answered, Yes, it was their proposal to negotiate.  
6 Is that right?

7 A Uh-huh (affirmative).

8 Q And then you were asked, were you not, Had  
9 they represented you or any of your entities prior to  
10 that? And you answered, Not that I recall. Is that  
11 correct?

12 A Correct. Well, what happened -- excuse  
13 me.

14 Q Then you were asked, were you not, how did

15 it come to you to suggest to you that you negotiate  
16 with the plaintiff's lawyer? And you answered, One  
17 of their recent partners, an individual who had just  
18 recently joined their firm had represented me at  
19 another firm.

20 Question, And who was that? And you  
21 answered, David or Dr. David Friedman or Friedman.  
22 Is that correct?

23 A Right.

24 Q The question was, At what firm had he  
25 represented you? And the answer was, At Mudge, Rose?

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1 A Correct.

2 Q Question, And he introduced you to  
3 Mr. Benson and Mr. Kasowitz and you answered, That's  
4 correct?

5 A That's correct.

6 Q The question was, Mr. Benson and  
7 Mr. Kasowitz made the proposal. Answer, Mr. Kasowitz  
8 did, yes. Mr. Benson was involved, too, yes. Is  
9 that correct?

10 A That's correct.

11 Q Now, in the course of these conversations  
12 when Mr. Murray approached you about these long-time  
13 counsel for Liggett joining Latham & Watkins, you  
14 were told that PM was willing to pay, PM meaning  
15 Philip Morris, willing to pay the legal fees, is that  
16 what you're saying?

17           A     Only after I suggested they go to Kasowitz  
18 Benson instead, not before that happened.  
19           Q     And you said you couldn't understand why  
20 Philip Morris would pay your legal fees?  
21           A     Correct, or would want to pay my legal  
22 fees.  
23           Q     Did you ask Mr. Murray that question?  
24           A     Probably.  
25           Q     Wasn't it true, Mr. LeBow, that there was

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1   concern about whether Liggett could provide the  
2   necessary funds to successfully defend itself in the  
3   increasing numbers of cases?  
4           A     I never heard that concern.   From whom?  
5   Concern from whom?   Amongst us or amongst Philip  
6   Morris?  
7           Q     Amongst yourself and amongst other  
8   companies.  
9           A     I don't know what the other companies were  
10   thinking.   Yeah, we were getting somewhat concerned  
11   about the rising number of cases, yes.  
12           Q     And you were concerned, were you not, about  
13   your ability to continue to fund the legal defense  
14   for all these cases?  
15           A     I wasn't concerned at that time, no.   Maybe  
16   it would have become a concern later on, but not at  
17   that time.  
18           Q     Weren't there directions being issued  
19   either from you or from management at Liggett about

20 trying to curtail the defense and the costs of the  
21 defense for Liggett assumed by Liggett's counsel?  
22 A Nobody curtailed the defense. But  
23 obviously we wanted to cut costs and we did  
24 successfully cut costs the year before. I put things  
25 on pretty much -- we had an agreement with the Mudge,

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1 Rose people in this case, when it was Mudge, Rose, to  
2 a fixed amount of money per month paid out in a  
3 period.

4 Q And they were to do the best they could  
5 with what that would cover?

6 A That's correct.

7 Q Did you also testify yesterday that for a  
8 few years Liggett had been paying eight or \$9 million  
9 a year in legal fees and was piggybacking on the  
10 efforts of other companies?

11 A Around the \$8 million level, yes.

12 Q And it had become increasingly difficult to  
13 fund that eight to \$9 million level given Liggett's  
14 financial situation, wasn't it?

15 A Liggett's financial situation before 1995  
16 was starting to improve, but we were funding it  
17 currently. It was being paid currently. There were  
18 no issues.

19 Q Defending smoking and health cases had  
20 proven to be very expensive, hadn't it?

21 MR. BENSON: Objection.

22 COURT REPORTER: I'm sorry?

23 Q Defending smoking and health cases,  
24 particularly with the Attorneys General cases and the  
25 Castano cases, had proven to be very expensive,

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1 hadn't it?

2 A No.

3 Q Particularly with the Attorney General  
4 cases and Castano cases had proven to be very  
5 expensive, hadn't it?

6 MR. BENSON: Objection.

7 A It had stayed at that same level for quite  
8 a few years. It had been at the six million, seven  
9 million, \$8 million level for a few years.

10 Q That's because you had kept it at that  
11 level, in terms of what you were willing to spend,  
12 correct?

13 A Correct.

14 Q Even though the amount of litigation had  
15 increased, correct?

16 A Somewhat, yes.

17 Q Now, certainly, Mr. LeBow, you were  
18 concerned, as being involved with one tobacco  
19 company, about other tobacco companies losing cases  
20 and the possible avalanche of lawsuits, weren't you?

21 A Liggett could not afford to lose even one  
22 case, so I wasn't concerned about an avalanche. I  
23 was concerned about any one case.

24 Q Now, up until that time, you had been

25 virtually not involved in defending smoking and

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1 health litigation; isn't that right?

2 A Personally?

3 Q Yes.

4 A Yes, I was not personally involved.

5 Q And you had never been represented,  
6 according to your sworn testimony, by the Kasowitz  
7 firm; is that right?

8 MR. BENSON: Objection.

9 A Not in smoking and health, I had not been  
10 represented by them. In bankruptcies, yes.

11 Q You had been represented by Mr. Friedman  
12 while he was with the Mudge, Rose firm; is that  
13 right?

14 A At Mudge, Rose and for a while he was at  
15 Kasowitz. And he did some cleanup work, so to speak,  
16 for us at Kasowitz.

17 Q Now, are you certain when he left and went  
18 to Kasowitz?

19 A I'm not certain. I believe it was, I guess  
20 late '94 or early '95. But sometime in late '94,  
21 early '95 he went to Kasowitz.

22 Q And he had never worked on smoking and  
23 health matters for your companies, had he?

24 A David Friedman?

25 Q Yes.

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1           A     Not to my knowledge.

2           Q     He was not a products liability lawyer, was  
3 he?

4           A     No, he was a bankruptcy lawyer.

5           Q     He had gone with this firm that had never  
6 before represented you on anything, correct?

7           A     Correct.

8           Q     And you had no experience in defending  
9 smoking and health cases, correct?

10          A     Correct.

11          Q     Did your lawyers ever tell you or  
12 Mr. Murray ever tell you that Mr. Kearney or  
13 Mr. Decker preferred to go to Latham & Watkins?

14          A     I never talked to Mr. Kearney directly.

15          Q     Did Mr. Murray ever tell you that  
16 Mr. Kearney and Mr. Decker wanted to go to Latham  
17 & Watkins?

18          A     I don't understand what that has to do with  
19 anything. I'm the one paying the bills, not them. I  
20 don't care where they preferred to go. I want to go  
21 where I have a relationship and go to the firm I  
22 wanted to go to.

23          Q     Wherever they were going to practice law,  
24 you were going to control that?

25          A     Control what?



1 Q Where they wanted to practice law?

2 A I wanted them to go someplace where I  
3 wanted them to go. If they didn't, I would get other  
4 lawyers.

5 Q Now, you expressed some concern about the  
6 amount and the nature of the litigation; is that  
7 right?

8 A Yes.

9 Q And you talked with the Milbank lawyers and  
10 with your -- and some tobacco industry analysts?

11 A And to counsel.

12 Q Did you go back to Joe Murray and ask him  
13 about the Castano lawsuit in detail or about the  
14 Attorneys General lawsuit in detail to get some more  
15 information about what the issues were?

16 A Yes.

17 Q Did he provide you information?

18 A He provided some lengthy memos, yes, at  
19 that time.

20 Q Are you willing to provide those memos to  
21 us?

22 A I don't have them.

23 Q Do you waive any privilege with respect to  
24 those memos?

25 A Yes.

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1 Q And did he tell you in those communications  
2 that there -- regardless of the merits of the claims,

3     there were a lot of dollars at issue in the lawsuits?

4           A     He probably did, yes.

5           Q     Did you ask him for any additional  
6     information?

7           A     I don't recall.

8           Q     Did you ask the lawyers who were defending  
9     the case on the frontline, Mr. Kearney, Mr. Decker,  
10    and others, for their assessment of the claims?

11          A     I told you, I don't -- I didn't talk to  
12    them at all.

13          Q     Did you ask any lawyers at Milbank to  
14    talk with your lawyers at -- wherever they were,  
15    Mr. Kearney and Mr. Decker, concerning the claims as  
16    part of the overall proxy by you?

17          A     No.

18          Q     Now, there was certainly no reason that the  
19    lawyers of Milbank couldn't have talked with  
20    Mr. Kearney and Mr. Decker, was there?

21          A     They could have talked to them. I have no  
22    idea.

23          Q     You hadn't --

24          A     They may have talked to them on their own,  
25    as far as I know.

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1           Q     But you didn't ask them to do that?

2           A     Not that I recall.

3           Q     And you never asked the Milbank lawyers for  
4    their analysis of these issues, did you?

5           A     No.

6           Q     You could have called Mr. Murray and  
7     asked for more information than you previously had  
8     requested and gotten.   You could have called in  
9     Mr. Kearney and Mr. Decker.   You could have called in  
10    the Milbank lawyers, but you did none of that?

11          A     Yes.

12          Q     And you could have called management at  
13    Liggett and had them investigate, couldn't you?

14               MR. BENSON:   Objection.

15          A     Yes.

16          Q     And you could have gone to talk with the  
17    scientists or had some of your lawyers from the Brook  
18    Group or from Milbank go talk with the lawyers -- I  
19    mean, scientists, talk with the scientists, couldn't  
20    you?

21               MR. BENSON:   Objection.

22          A     Yes.

23          Q     I believe we had established that you also  
24    hadn't called on Liggett management and you hadn't  
25    called on Liggett scientists.

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1               And as far as you know, they could have  
2    provided whatever information you wanted?

3          A     Their opinions they could have provided.

4          Q     And you also could have had the Kasowitz  
5    firm simply investigate and get a second opinion  
6    directly by looking at documents, talking to Liggett  
7    scientists and talking to Mr. Decker and Mr. Kearney,

8     couldn't you?

9           A     We already said we didn't have enough money  
10    to pay all these legal fees. I wasn't about to waste  
11    my money on that.

12          Q     So instead of calling in Kearney and  
13    Decker, or anyone like that, you said, New lawyers  
14    from the Kasowitz firm, go talk to the plaintiff's  
15    lawyers and, surprise of surprises, the plaintiff's  
16    lawyers said, We have great claims; is that right?

17          A     Well, instead of talking to the lawyers who  
18    were being paid by Philip Morris -- let's call them  
19    that. Instead of talking to the lawyers being paid  
20    by Philip Morris, I asked Kasowitz to let's talk to  
21    the other side and let's listen to them.

22                Yeah, sure, the other side was saying they  
23    got good claims. I want to hear the claims. And we  
24    sat down and started listening to their claims and  
25    hearing some of the other side. We start -- we sat

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1    down, we started listening to the claims and hearing  
2    some of the other side.

3          Q     And, of course, they told you they had  
4    great claims?

5          A     Naturally.

6          Q     The Kasowitz lawyers came back to you and  
7    said, Plaintiff's lawyers say they have great claims  
8    and they're willing to negotiate; is that right?

9          A     Correct.

10         Q     And you said, Let's negotiate?

11           A     Let's meet and talk is what I said. It  
12     can't hurt to talk. I saw nothing wrong with  
13     talking.

14           Q     You and your lawyers went off to negotiate  
15     with the plaintiff's lawyers?

16           A     Correct.

17           Q     And your team consisted of you, who had not  
18     been involved in the day-to-day business of Liggett  
19     and in the day-to-day handling of smoking and health  
20     issues, correct?

21           A     Correct.

22           Q     And who knew very little about the  
23     litigation itself at that point in time?

24           A     Correct.

25           Q     And the Kasowitz lawyers, who knew what the

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1     plaintiff's lawyers had told them the issues and the  
2     claims were?

3           A     And had done their own independent research  
4     from the public records.

5           Q     What was on the Internet?

6           A     No, the documents from the courthouses. I  
7     don't know if all that was on the Internet.

8           Q     They had not looked at any Liggett  
9     documents, had they?

10          A     To my knowledge, no.

11          Q     And they had not talked with any Liggett  
12     personnel, had they?

13           A     No, I don't believe so.

14           Q     You didn't let anyone else in the industry

15 know you were having these conversations, did you?

16           A     No, I did not.

17           Q     At the time you went to negotiate, a proxy

18 fight was well underway, was it?

19           A     The solicitation was well underway, consent

20 solicitation it was called.

21           Q     That was the consent solicitation to try to

22 get the RJR Nabisco board to spin off Nabisco?

23           A     That's correct.

24           Q     Or alternatively to get the shareholders,

25 if the board wouldn't take that action, to elect a

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1     slate of directors that you proposed?

2           A     No, that was not part of the consent

3 solicitation.

4           Q     That wasn't part of the initial consent

5 solicitation, but that ultimately became the

6 strategy, didn't it?

7           A     Yeah, ultimately if they refused to do

8 what the shareholders wanted them to do. If the

9 shareholders requested that they just independently

10 spin off Nabisco and do the right thing, and they

11 kept saying they could not do it.

12           Q     And if they did not do it, you wanted the

13 shareholders to elect your slate of directors?

14           A     Who were committed to doing it.

15           Q     That slate of directors included yourself

16 and Mr. Fulford, who later become CEO of Liggett?  
17 A Correct.  
18 Q Now, prior to that consent solicitation --  
19 A Excuse me, let me correct that. I don't  
20 think Mr. Fulford, at this point in time, was on the  
21 board or a regular member of the board. No, he was  
22 not part of the board solicitation, that's not  
23 correct.  
24 Q At some point during that consent  
25 solicitation process, was Mr. Fulford's name not put

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1 before the RJR and Nabisco shareholders as the person  
2 you proposed as the new CEO of RJR Nabisco?  
3 A Yes, but not as a director.  
4 Q Now, prior to commencing that consent  
5 solicitation, you had conducted a number of  
6 activities during the year 1995 designed to combine  
7 Liggett with another tobacco company, hadn't you?  
8 A Which tobacco company?  
9 Q Well, without being specific first, had you  
10 not during 1995, attempted to discuss various  
11 parties' deals whereby Liggett would be combined with  
12 another tobacco company?  
13 A No.  
14 Q Had you not approached RJR Nabisco about  
15 combining Liggett and RJR Nabisco?  
16 A I approached RJR Nabisco about Liggett,  
17 Reemsa, a large German tobacco company, and RJR, the

18 three of us entering into a venture.

19 Q Now, Mr. LeBow, the reason you were doing  
20 those things is because being a businessman and being  
21 aware of Liggett's worsening financial situation, you  
22 believed that you needed to come up with some  
23 creative ideas to combine Liggett with some other  
24 companies, didn't you?

25 A No, that was not part of the strategy.

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1 I was a major shareholder of RJR. Myself and  
2 Mr. Icahan, who is my associate in this venture. We  
3 were the second largest shareholder of RJR. And we  
4 did all this to make money because we felt there's  
5 value, as everyone on Wall Street felt.

6 As today, even today as we sit here today  
7 they still believe there's value in splitting up the  
8 tobacco and food business. That was the primary  
9 rationale for the consent solicitation and the  
10 potential proxy change.

11 Q As a part of that spinoff, you had in your  
12 mind, did you not, Liggett being combined with  
13 Reynolds and/or another company?

14 A No. That was not part or condition of any  
15 deal, no.

16 Q But that's what you ultimately had in your  
17 mind as your plan, whether you made it a condition or  
18 not; is that right?

19 MR. BENSON: Objection.

20 A It's possible. But it would be up to the



21 shareholders of RJR to approve it, which they would  
22 only do if it made sense. They wouldn't do it if it  
23 was not economical sense to them.

24 Q And to the extent that they approved your  
25 board of directors, that increases the chances that

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1 the two companies would combine and the food business  
2 would be spun off, did it not?

3 A Well, improved the chances -- the food  
4 business being spun off, that was part of the  
5 commitment that our board made. There was no  
6 commitment whatsoever vis-a-vis Liggett.

7 Q And isn't it true that in late 1995, part  
8 of what was driving you was on the one hand a need  
9 for this consent solicitation and this proxy battle  
10 to proceed successfully, from your standpoint, on one  
11 side, and at the same time a need to control the  
12 exposure your company had or fear that you had with  
13 respect to liability issues?

14 A At that point in time, again, I did not see  
15 any documents then. I do not know any of the public  
16 health issues at this point in time. I just had  
17 suspicions.

18 At that point in time, the need to protect  
19 Liggett against a devastating lawsuit or judgment and  
20 this issue you're talking about, they were both my  
21 motivations, yes.

22 Q And as I believe you said, Liggett could

23 not afford to suffer even a small judgment at that  
24 point in time?

25 A Relative to the other companies, that's

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1 correct. That's still correct today, as a matter of  
2 fact.

3 MR. NYHAN: Your Honor, this would be an  
4 appropriate point to take a stretch break.

5 THE COURT: All right. Ladies and  
6 gentlemen, I'm going to ask you to step back in the  
7 jury room for about five minutes. There's still  
8 about another 45 minutes to the deposition. So we  
9 thought we would break in between.

10 Please do not discuss the case among yours  
11 or with anyone else and just take about a five-minute  
12 break.

13 (Jury exits courtroom and recess)

14 THE COURT: Mr. Parrish, Mr. Matthews, may  
15 I see you a minute, please.

16 (Change of reporter, 2:35 p.m.)

17

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1 THE COURT: Okay. If you're ready to  
2 proceed, Ms. Hartley.

3 MS. HARTLEY: I'm ready, Your Honor.

4 THE COURT: Bring them in, please.

5 (Jury enters the courtroom).

6 THE COURT: Ladies and gentlemen, if you  
7 all are uncomfortably hot, we've tried to get them  
8 to do something about it, but they can't -- they  
9 can't. So if you're comfortable, then you're going  
10 to remain so. If you're hot, you're going to remain  
11 so.

12 THE COURT: Are you ready to proceed,  
13 Mr. Nyhan?

14 MR. NYHAN: Yes, Your Honor. We'll resume  
15 the cross-examination of Bennett LeBow.

16 THE COURT: All right. Thank you, sir.

17 Q I'm asking you about your company, Mr.  
18 LeBow, and whether you needed in 1995 and early '96,  
19 as a businessman trying to protect the interest of  
20 your company, whether you needed to reach a deal to  
21 settle those cases?

22 A It was a prudent business thing to do,  
23 considering that trials were coming up a year  
24 and-a-half later. Even though Philip Morris was  
25 paying my legal fees at that time, it was a prudent

1 thing to do.

2 Q And it was a prudent thing to do,  
3 regardless of whether the documents and the history  
4 of the tobacco litigation was favorable to Liggett  
5 or unfavorable to Liggett, it was still a prudent  
6 thing to do settlementwise?

7 A Absolutely. At that point in time, that's  
8 absolutely true.

9 Q And that's the way you looked at it from  
10 your standpoint for Liggett?

11 A I had no other facts to go on at that  
12 time. All I had was my -- were my suspicions.

13 Q And you proceeded with your Kasowitz  
14 lawyers to try to strike that deal?

15 A Correct.

16 Q And another incentive you had in striking  
17 that deal was in addition to getting out the frying  
18 pan, so to speak, from the standpoint of these  
19 liability suits, you also might be able to structure  
20 it in a way that gave you an advantage in your  
21 consent solicitation fight with RJR Nabisco?

22 MR. BENSON: Objection.

23 A Proxy; not consent solicitation.

24 BY MR. VAUGHAN:

25 Q Well, now in the proxy fight, in the proxy

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1 fight with RJR Nabisco?

2 A Possibly, yes.

3 Q And, in fact, you structured a deal that  
4 was designed to do exactly that?

5 A Correct.

6 Q And you took that deal and waved it to the  
7 shareholders of RJR Nabisco as a way that they could  
8 limit the exposure of their company, as you saw it,  
9 and at the same time spin off the food business?

10 A Correct.

11 Q And the result of that deal would have  
12 been -- would have been a combination of Liggett and  
13 R. J. Reynolds Tobacco Company?

14 A No, that was not a guarantee. That was up  
15 to the shareholders.

16 Q It was up to the shareholders?

17 A Right.

18 Q And the board of the new RJR Nabisco?

19 A No, not the board, just the shareholders.

20 Q What I'm trying to ask you, Mr. LeBow, is  
21 whether when you went back to the RJR shareholders,  
22 in your mind you had a deal that you wanted to wave  
23 to them and convince them to sign on too so that  
24 ultimately Liggett could be combined with R. J.  
25 Reynolds Tobacco Company?

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1 MR. BENSON: Objection. He's answered it  
2 about 18 times.

3 A If the shareholders approved, subject to

4 their sole discretion, sole approval, yes.

5 Q And you tried to structure the deal in a  
6 way that would give him an incentive to do so?

7 MR. BENSON: Objection.

8 A Excuse me. The deal was also structured  
9 in such a way that any other tobacco company would  
10 get the same benefit, or could get the same benefit,  
11 if their shareholders were to approve it. So it was  
12 up to any company that wanted to get these -- this  
13 benefit of this deal, except Philip Morris in '74.  
14 Any other tobacco companies could have gotten the  
15 same benefit.

16 Q And you were willing to talk to the other  
17 companies as well as a businessman?

18 A Yeah, of course. I had a fiduciary  
19 responsibility. I must talk to them.

20 Q Another result was you lost the proxy  
21 fight, didn't you?

22 A Very badly, yes. All of the shareholders  
23 voted against it after they saw the settlement. And  
24 a lot of the shareholders, I will add, you know, are  
25 also Philip Morris shareholders simultaneously. I

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1 think if we had that vote today it would be a  
2 different story, but that's a different issue.

3 Q And, furthermore, after this settlement  
4 was reached Liggett's financial condition continued  
5 to deteriorate, didn't it?

6 A I'd say it somewhat accelerated.

7 Q The deterioration accelerated?

8 A Yes. The revenue sales accelerated --  
9 declined, accelerated.

10 Q We've spent some time over the last couple  
11 of days talking about Philip Morris' payment of  
12 legal fees for Liggett in defense of smoking and  
13 health cases.

14 Do you recall whether there was  
15 correspondence between Philip Morris and Liggett  
16 and/or Brook with respect to those matters?

17 A Yes.

18 Q Do you recall, insofar as the terms of the  
19 arrangement were concerned, that Philip Morris  
20 agreed as one of the terms that Liggett would  
21 control the defense of its cases?

22 A Liggett would have the final say, yes.

23 Q And be able to direct the activities of  
24 Mr. Kearney and the other lawyers defending the  
25 case?

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1 A Yes.

2 Q After the first settlement was reached and  
3 Mr. Kearney and his firm resigned, and later Mr.  
4 Murray resigned, did there come a time where someone  
5 from Mr. Kasowitz's office approached Mr. Kearney  
6 about representing Liggett again in some other  
7 cases?

8 A Yes.

9 Q And did they talk with you before they did  
10 that?

11 A They may have, yes.

12 Q And was an arrangement reached with Mr.  
13 Kearney and Latham & Watkins for Mr. Kearney and  
14 Latham & Watkins to defend Liggett's interest in  
15 litigation along with the Kasowitz firm?

16 A This was in a couple very individual  
17 cases, a couple that they had done a lot of work on,  
18 not in any of the class actions or any of the  
19 Attorneys General or any of the major cases, just a  
20 couple -- I think one or two, maybe tops three, very  
21 limited cases that the other companies were still  
22 involved in too.

23 Q And the Kasowitz firm was satisfied with  
24 that approach?

25 A Well, is was -- it was -- there was really

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1 no choice because they had the knowledge of those  
2 cases. We were kind of in a box. Theoretically  
3 they had the knowledge, and they weren't important  
4 cases at all. We didn't expect anything to happen  
5 with them because we had a settlement agreement.

6 Q Well, the Castano settlement applied to  
7 the national class action, did it not?

8 A Yeah, but the class action then overtook,  
9 you know, the various individuals.

10 Q But individuals were allowed to opt out of  
11 that class and pursue their own claims, weren't



12 they?

13 A I don't recall. Probably. Yes. I think  
14 they were, yes.

15 Q And in any event, once the class action --  
16 Castano class action was decertified, these other  
17 cases continued to exist?

18 A Right. There were still a couple of small  
19 cases around, right.

20 Q And under the terms of that arrangement  
21 that was reached, Philip Morris was to pay the legal  
22 fees?

23 A Yeah, they continued paying some legal  
24 fees, some minor legal fees for a couple minor  
25 cases.

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1 Q Well, they agreed to pay the legal fees  
2 for Mr. Kearney and Latham & Watkins to assist in  
3 the defense of the cases?

4 A Yes, because they had an interest in those  
5 cases, Philip Morris. But they would not pay Mr.  
6 Kasowitz's fees. They made that very clear.

7 Q They had an interest in those cases to see  
8 that sufficient resources were available to defend  
9 the cases properly?

10 A I believe they had their own interest at  
11 heart, not my interest at heart at all at that point  
12 in time. They made that very clear. So this then  
13 brought into question, who was Mr. Kearney really

14 working for.

15 Q And their own interest being that they  
16 didn't want any tobacco company to lose a lawsuit  
17 simply because it didn't have enough money to defend  
18 itself?

19 A Well, why would they care about that?

20 Q But that was the interest you understood  
21 that they had, right?

22 A I don't know. You'd have to ask them what  
23 their interest was.

24 Q No one ever communicated to you what the  
25 interest was?

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1 A No. Not in detail, no.

2 Q The Kasowitz's lawyers never told you what  
3 the interest was?

4 A What, what Philip Morris' interest was?

5 Q Why Philip Morris was paying the legal  
6 fees for Liggett.

7 A They were interested in making sure that  
8 there was some defense. But why they care, I don't  
9 know. They don't care about me today, so why would  
10 they care about me then?

11 Q Let me show you what we have marked as  
12 LeBow Exhibit No. 1363 styled "Settlement  
13 Agreement."

14 Is that document -- feel free to look  
15 through it if you wish to do so, the settlement  
16 agreement -- the first settlement agreement that you

17 reached, namely with the Castano plaintiffs?

18 A It appears to be, yes.

19 Q Turn your attention to Paragraph D on Page  
20 2. Does that contain a paragraph to effect that  
21 Liggett and Brook continued to deny any liability or  
22 any wrongdoing with respect to smoking and health  
23 issues?

24 A That's what it says.

25 Q And that paragraph was in it when you

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1 signed it, wasn't it?

2 A Uh-huh.

3 Q And then, if you would, look to Paragraph  
4 G down below. Let me see that for just one second,  
5 Mr. LeBow, so I can ask you a question about it.

6 A Uh-huh.

7 Q And that paragraph acknowledges, in part,  
8 that certain reasons for trying to settle the case,  
9 notwithstanding the denials of liability or the  
10 expense of proceeding to trial, and the uncertainty  
11 as to outcome?

12 A Right. But that was our -- our expense.  
13 Philip Morris was not going to pay our fees in this  
14 case, so it was my risk.

15 Q Earlier today you were asked about your  
16 testimony concerning addiction in Mr. Rosenblatt's  
17 deposition in 1993. Do you recall that?

18 A Yes.

19 Q And I believe you said that what you  
20 recalled testifying to was that, based on your  
21 personal experience in being able to quit that you  
22 did not believe that smoking was addictive; is that  
23 right?

24 A Yes.

25 Q Actually, you went a little further than

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1 that, didn't you, Mr. LeBow?

2 A I don't recall.

3 Q Go to Page 25 then.

4 A Okay.

5 Q And he was asking you about your quitting  
6 at the first part of that page?

7 A Uh-huh.

8 Q And then you were asked the question:  
9 "Millions of people say they can't do it, they want  
10 to quit and they can't" -- and there was an  
11 objection from Mr. Kearney. And Mr. Rosenblatt  
12 continued with the question, "Do you buy that," did  
13 he not?

14 A Yes.

15 Q And he asked that again by saying: "Do  
16 you buy that, that there were millions of people who  
17 would love to quit smoking but say they can't?" He  
18 asked you that question, didn't he?

19 A Yes.

20 Q And you answered, "No, I don't buy that;"  
21 is that right?

22 A Uh-huh.  
23 Q And he asked you, "Why;" is that right?  
24 A Yes.  
25 Q And you answered at that time, "because I

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1 have seen myself and other people quit like that."  
2 Again, indicating something quickly.  
3 A Uh-huh.  
4 Q Now, the next question was, "But have you  
5 not also seen the other side of the coin, people who  
6 really want to quit and who can't; they're not as  
7 strong -- they're not as strong as you and the other  
8 people that can't quit just like that?"  
9 Were you asked that question?  
10 A Uh-huh.  
11 Q Is that a yes?  
12 A Yes.  
13 Q And did you answer, "No, I have seen more  
14 the other way"?  
15 A Meaning I have seen other people also who  
16 can't quit, but more who could quit.  
17 Q And in the next question --  
18 A That's a personal -- a personal experience  
19 thing.  
20 Q And so in order to be sure he had nailed  
21 it down he again asked you, did he not, "You don't  
22 believe that tobacco is addictive?"  
23 He asked that question, didn't he?

24 A Yeah, based on my personal experience.

25 Q Did he ask you that question?

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1 A He asked that question.

2 Q And your answer was, "No, I do not"?

3 A At that time, that's what I believed.

4 Q Now, continuing, Mr. LeBow, to 1996, and  
5 specifically to the proxy -- well, to the -- yeah,  
6 to the proxy fight.

7 Let me have this next document marked by  
8 whatever number we're up to at this time.

9 Do you recognize that document, Mr. LeBow?

10 A I don't recognize it off hand, but it's  
11 apparently one of our documents.

12 Q So you do remember the document then?

13 A I vaguely remember it.

14 Q Let's turn to Page 4 of that document.

15 A These documents aren't paged -- aren't  
16 numbered.

17 Q Okay. If you would --

18 A I could count.

19 Q If you would, please.

20 A One, two, three, four. Okay. It does  
21 have a four.

22 Q Would you look at the last paragraph on  
23 that letter --

24 A Uh-huh.

25 Q -- on that page?

1           A     Right.

2           Q     Now, in that particular solicitation to  
3 RJR Nabisco shareholders you say, do you not, in --  
4 "On April 5, 1996, that together with the other  
5 tobacco companies we believe that the addiction  
6 theory is flawed."

7                     Do you say that?

8           A     That's what the letter says, yes.

9           Q     Does it also go on to say, "Tens of  
10 millions of former smokers who chose to stop smoking  
11 were able to do so successfully, and public health  
12 officials from the Surgeon General of the United  
13 States on down readily acknowledge that it is  
14 possible to stop smoking"?

15          A     Well, millions of people have stopped  
16 smoking, but millions of people haven't, also.

17          Q     And that was a statement of your and Brook  
18 and Liggett's position as of April 5, 1996; is that  
19 right?

20          A     Again, we have not reviewed any of the  
21 documents prior to this.

22          Q     But you had heard the plaintiffs' claims  
23 made during and before settlement negotiations  
24 commenced to settle the Castano lawsuit, hadn't you?

25          A     Yes.

1 Q Now, before lunch we had gotten down and  
2 through the settlement that you reached with the  
3 Castano plaintiffs and the results -- or at least  
4 some of the results of that settlement?

5 A Correct.

6 Q And we talked about a continuing  
7 deterioration in the financial condition of  
8 Liggett. In fact, I believe you said it accelerated  
9 after that settlement?

10 A After the first settlement, yes.

11 Q While that condition of the  
12 company -- or while the financial condition of the  
13 company was getting worse, the number of cases was  
14 increasing, wasn't it?

15 A What kind of cases?

16 Q Attorney Generals cases.

17 A Oh, yes.

18 Q They went from five or six cases, I think  
19 we said before, to double digits?

20 A But Liggett was not mentioned in every one  
21 of those cases.

22 Q Not in every one, but they were mentioned  
23 in enough to cause --

24 A Yes.

25 Q -- to cause significant financial concern

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1 for you as CEO of Brook?

2 A Not immediate concern. We had other



3 concerns besides that. Those trials were years off,  
4 so it was not an immediate concern.

5 Q But you had more pressing concerns, but  
6 you also had concerns about those cases?

7 A On the basis of them needing concern, yes,  
8 they're a concern.

9 Q And, in fact, some of those trials were  
10 scheduled to come to trial within a year or two,  
11 weren't they?

12 A Yes.

13 Q You concluded that Liggett needed to  
14 settle those cases?

15 A And Liggett needed to do the right thing.

16 Q And that was before you had looked at any  
17 documents?

18 A No.

19 Q When did you commence looking at  
20 documents?

21 A Within a month or so after the first  
22 settlement. Not me again, my attorneys.

23 Q Now, we went through that yesterday so  
24 we're not going to go through back through it again  
25 right now.

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1 A Right.

2 Q But you undertook to try to reach a  
3 settlement with the Attorneys General?

4 A Well, part of our original deal in March

5 of '96, we had let -- we had, by definition, knew  
6 there were more cases to be settled. We started  
7 that immediately. That was nothing new there. It  
8 has nothing to do with any new cases. I mean, I  
9 think a week after the March '96 settlement we had a  
10 meeting with Texas to try and settle that. And, you  
11 know, we had a commitment from the other Attorney  
12 General that did settle with us that they would help  
13 us settle the rest of the other lawsuits.

14 Q So you started trying to settle those  
15 Attorney General cases right after the Castano case?

16 A No, right after the March '96 settlement  
17 agreement, immediately.

18 Q Right after the settlement of that case?

19 A Absolutely. That was part of the original  
20 deal.

21 Q And so that was itself still before you  
22 commenced any internal review of any kind of  
23 documents?

24 A Correct.

25 Q So you had made that decision not knowing

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1 what was in those documents or what Liggett  
2 scientist would say, but had made that decision  
3 because it made business sense to you to do so?

4 A Well, I made that decision to settle all  
5 lawsuits, if I could, in March of '96. Now, we had  
6 one meeting about a week after that, and then there  
7 were no meetings after that, no conversation for

8 quite a few months while we studied the documents.

9 Q Now, when you got to the settlement  
10 with the -- to the actual settlement with the  
11 Attorneys General --

12 A The second settlement?

13 Q The second settlement, the one in March of  
14 1997.

15 A Correct.

16 Q That settlement, I believe you testified  
17 yesterday, contained some financial terms?

18 A Yes.

19 Q And those financial terms were terms that  
20 you describe as being necessary for Liggett to  
21 survive?

22 A Yes.

23 Q Actually reaching a settlement with the  
24 AGs was necessary for Liggett to survive?

25 A Right. Everything to survive, yes.

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1 Q Now, as far as the financial term for  
2 concern, do you recall what Liggett was to pay in  
3 dollars?

4 A Assuming we got full protection from all  
5 of the Attorneys General and all of the -- and under  
6 a class action, which was being filed in Alabama, we  
7 would paid 27 and-a-half percent of our pretax  
8 earnings.

9 Q Which were how much for 1996?

10 A Negative.

11 Q How much would that be for 1997?

12 A A very small amount. Obviously I don't  
13 know the answer yet because '97 is not over.

14 Q Would you agree, Mr. LeBow, that the  
15 Attorneys General and their lawyers settling with  
16 you in this second settlement knew that Liggett was  
17 in difficult financial circumstances?

18 A That was all public knowledge. No  
19 secrets.

20 Q And would you agree that the dollars they  
21 might take in from Liggett was not the primary  
22 reason they settled in March of 1997 with Liggett?

23 MR. BENSON: Objection. Objection.

24 A I think you'll have to ask them that  
25 question, but they have pretty much said that to be

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1 true.

2 Q And you have no reason to doubt that  
3 knowing your financial condition and being a  
4 business man, do you?

5 A No reason to doubt that.

6 Q Well, what you were able to provide in  
7 March of 1997 was some assistance in the pursuit of  
8 their lawsuits?

9 A I was able to provide the truth for the  
10 first time in this country.

11 Q You were able to provide them assistance  
12 in pursuing your lawsuits?

13           A     You call it assistance. I call it the  
14 truth.

15           Q     Well, you aren't willing -- I think you  
16 told us earlier -- to provide the truth to states  
17 that didn't settle with you, were you?

18           A     But once it got through most of the  
19 states -- these states weren't going to trial anyhow  
20 for months -- for years, so it made no difference.

21           Q     You said you didn't waive any privileges  
22 to states that didn't settle with you, didn't you?

23           A     Well, this was the intent to get them in.  
24 If you recall -- if you read the document correctly,  
25 there was no provision made for states who had not

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1 signed, so we had to have something for them to come  
2 and sign. They were not part of the class action  
3 either. They had the right to opt out in the class  
4 action.

5           Q     Mr. LeBow, if your only concern were  
6 public health, there was nothing to prevent you from  
7 coming and saying exactly what you said, turning  
8 over documents, doing whatever you wanted to do to  
9 assist the Attorney General, without reaching a  
10 settlement agreement with them, was there?

11                   MR. BENSON: Objection.

12           A     Yes, because those documents could in  
13 court then be used against us and bankrupt Liggett.

14           Q     So you wanted to make sure Liggett was

15 protected?

16 A Absolutely. No question about it.

17 Q And in order to obtain that protection you  
18 had to agree to do certain things?

19 A That's part of the deal. It wasn't -- you  
20 know, it was all -- the whole involved, complicated  
21 deal.

22 Q And one of those -- and these terms were  
23 identified by the Attorneys General, what they  
24 wanted, weren't they?

25 A They were negotiated.

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1 Q Well, they came up with the idea of having  
2 to waive privileges on your documents, didn't they?

3 A No, I don't think so. No. I think  
4 Kasowitz's firm came up with that idea.

5 Q Well, it was offered as an inducement for  
6 them to settle?

7 A You call it what you want to call it, but  
8 it was our offer and not their demand.

9 Q Now, the Attorneys General, once this was  
10 raised by the Kasowitz firm, or by whoever --  
11 whoever it was raised -- insisted that the provision  
12 be in the document, didn't they, that you would  
13 waive your privileges?

14 A Oh, yeah, sure.

15 Q In addition, you agree to make a public  
16 statement, did you not?

17 A Correct.

18 Q Let me direct your attention to the  
19 last -- you're welcome to read for the record all of  
20 it, but I'm especially concerned with the part that  
21 says, "We at Liggett." Beginning halfway down, if  
22 you would read for the record the rest of that  
23 paragraph.

24 A "We at Liggett know and acknowledge that  
25 as the Surgeon General, respected medical

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1 researchers have found cigarette smoking causes  
2 health problems, including lung cancer, heart and  
3 vascular disease and emphysema. We at Liggett also  
4 know and acknowledge that as the Surgeon General the  
5 FDA and respected medical researchers" --

6 THE COURT REPORTER: I'm sorry.

7 A "And respected" -- I'm sorry.

8 "We at Liggett also know and acknowledge  
9 that as the Surgeon General, the Food and Drug  
10 Administration and respected medical researchers  
11 have found nicotine is addictive."

12 Q Both of those sentences began with "We at  
13 Liggett;" is that right?

14 A Correct.

15 Q Did you go and talk to the management at  
16 Liggett?

17 A The -- I'm trying to remember now. I  
18 believe Mr. Fulford was a part of this. He saw all  
19 this.

20 Q Did you -- we can go back through the  
21 depositions if you wish.

22 Did you not tell Mr. Grossman that you  
23 handled some of this case?

24 A Yeah. But I negotiated most of the  
25 settlement, but Mr. Fulford was part of this. He

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1 saw it prior to it being signed. He was kept  
2 apprised of what was happening. He did not -- he  
3 did not participate in the negotiations.

4 Q Is it your testimony that Mr. Fulford read  
5 and affirmatively signed off on that statement?

6 A No, he did not sign anything. I signed  
7 it.

8 Q Okay. When I say "signed off," I mean did  
9 he tell you that he agreed to that statement?

10 A I don't know if he did or not. But he was  
11 aware of it, let he's put it that way.

12 Q Did you consult with anyone else at  
13 Liggett, scientists or otherwise, as to whether  
14 Liggett -- the people at Liggett -- agreed with what  
15 you were saying when you said "We at Liggett"?

16 A No, I did not.

17 MR. BENSON: Objection.

18 A No, I did not.

19 Q Since there is some question, and there  
20 was a question raised yesterday about this  
21 particular document we have shown you as being the  
22 Attorneys General agreement, and specifically



23 whether that provision's -- the provision in there  
24 that creates an incentive for other tobacco  
25 companies to merge with your company.

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1           Let me direct your attention to the 10K  
2 you identified -- excuse me, 10Q you identified  
3 earlier as the LeBow Exhibit 1362, and ask you to  
4 look at the paragraph on the bottom of Page 23.  
5           A     Right.  
6           Q     That refers to both settlement agreements,  
7 doesn't it?  
8           A     Yes.  
9           Q     And you're welcome to look at the earlier  
10 pages, if you wish to do so --  
11          A     That's okay.  
12          Q     -- but those settlement agreements were  
13 the ones we've been talking about, the one on the  
14 Castano case, and the one with the AGs.  
15          A     Correct.  
16          Q     Does that paragraph -- excuse me just a  
17 minute, Mr. LeBow -- provide that under both  
18 settlement agreements any other tobacco company  
19 defendant, except Philip Morris, merging or  
20 combining with Liggett or BGL prior to the fourth  
21 anniversary of the settlement agreements would  
22 receive certain settlement benefits, including  
23 limitations on potential liability and not having to  
24 post a bond to appeal any future adverse judgment?

25           A     That's what it says.

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1           Q     Does it also say, in addition, within 120  
2     days following such a combination, Liggett will be  
3     required to pay the settlement fund 25 million  
4     dollars?

5           A     Correct.

6           Q     And does it also provide that both the  
7     Attorneys General and the nationwide class have  
8     agreed not to seek an injunction preventing any  
9     defendant tobacco company combining with Liggett or  
10    BGL spinning from spinning off any of its affiliates  
11    which are not engaged in the domestic tobacco  
12    business?

13          A     Correct.

14          Q     And does that 10Q accurately summarize  
15    those provisions of the agreement?

16          A     Well, you have to take -- you've got  
17    to read it correctly. It says, "certain settlement"  
18    -- give it back to me.

19          Q     Certainly.

20          A     You're reading it -- you're reading it,  
21    and maybe it's poorly written, but it says, "certain  
22    settlement benefits." And what it should say,  
23    "including some limitations of potential  
24    liabilities."

25          Q     What does it say?

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1           A     It just says, including limitations. It  
2     doesn't say "including certain limitations." I mean  
3     the word certain applies to both things. You're  
4     ignoring the word "certain," which maybe should have  
5     been in here. We could argue that from now or  
6     forever.

7           Q     I didn't ignore a word that was in there,  
8     did I?

9           A     No. But if you read the agreement, it's  
10    clear in the actual agreement. This is a summary of  
11    the agreement -- of the actual agreement. The  
12    actual agreement is very clear that limitations or  
13    potential liability, you know, is not limited for  
14    the tobacco company.

15          Q     But there are limitations on the liability  
16    of the company?

17          A     No. It says -- no. It says the company  
18    would receive certain settlement benefits including  
19    limitations, what limitations are defined here.  
20    And, yes, there are certain limitations on  
21    liability, but a limitation of liability are limited  
22    to -- if you read this and if you ever get the right  
23    copy and read it -- are limited to the parent  
24    company only, not to the tobacco company.

25          Q     Okay. But the intent of those provisions

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1 was to create an incentive for those companies to  
2 join with you?

3 A Not the tobacco companies, the parents.

4 Q Didn't you say in your own Castano  
5 agreement that what was driving you was not that you  
6 admitted liability, but that you wanted to avoid  
7 legal expenses and the uncertainty associated with  
8 the outcome?

9 A Now, you're talking about just Liggett.  
10 That's correct for Liggett. Again, that was before  
11 we saw the documents.

12 Q Let me turn your attention back to the  
13 deposition that was taken on July 18, 1997. If you  
14 look at Page 162 -- well, let's start a little bit  
15 early.

16 If you'll look back at 159 and come  
17 forward, possibly even 158 if you want to to get the  
18 context, Mr. Grossman was asking you, was he not,  
19 why certain provisions under Paragraph 17 were  
20 pertinent to the agreement?

21 A Yeah. What's your question?

22 Q And on Page 159 at Line 24 he asks you,  
23 "And you asked for this provision, which was the  
24 bond provision, so that if another tobacco company  
25 were to lose a very big judgment, you could make a

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1 proxy run at that company and have the asset during  
2 the proxy run of not having to make -- to have that  
3 tobacco company or its parent or subsidiaries or

4 affiliates post a bond; is that correct?" And  
5 that's what he asked you, wasn't it?  
6 A That's why that provision was put in, yes.  
7 Q That's what he asked you, wasn't it?  
8 A Yes, but at this time --  
9 Q And he -- is that right?  
10 A Go ahead. Yes.  
11 Q And your answer was, "that's correct"?  
12 A That's correct. That was put in for that.  
13 Q And then he said, did he not, "Again,  
14 Paragraph 17.3 is of benefit to you, only if the  
15 other tobacco companies were to lose the litigation;  
16 is that correct?" Did he ask you that?  
17 A Yes.  
18 Q And did you answer, "that's correct"?  
19 A Paragraph 17.3 has some benefit, right.  
20 Q And then he said, "Now, Paragraph 17.4,  
21 who asked for that provision?" And you answered,  
22 "Again, these are all the same," did you not?  
23 A Yes.  
24 Q And you went on to say, "I'll concede  
25 these are all the same, what they say." And you

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1 asked, "Do we have to go through each one of these;"  
2 correct?  
3 A Correct.  
4 Q And he said, did he not, "No, I won't.  
5 I'm just going through two more. As a matter of

6 fact, 17.4 you asked for; is that correct?"  
7 And you answered, "I'm trying to  
8 remember. I'm sure we asked for it. I think it  
9 just relates to -- it's clarification of 17.2(b) or  
10 something"?  
11 A I don't know what your point is, but go  
12 ahead.  
13 Q And then he asked, "17.4 again is an  
14 asset?" And you answered, "correct;" is that right?  
15 A Correct.  
16 Q And he went on to say, "Asset to you only  
17 if the other tobacco companies lose?"  
18 And you answered, "Correct;" is that  
19 right?  
20 A Right.  
21 Q Mr. LeBow, let me show you what's been  
22 marked as LeBow Exhibits 1365, 1366 and 1367.  
23 (Change of reporter, 3:15 p.m.)  
24  
25

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1 Q Can you identify those documents?  
2 A Yes, they are documents from Philip Morris  
3 to Liggett regarding the payment of attorneys' fees.  
4 Q And specifically, the payment of  
5 attorneys' fees with respect to Mr. Kearney and  
6 Latham & Watkins?  
7 A That's correct.  
8 Q Document 1365 and 1366 appear to contain

9 signatures for Liggett and Brook Group; is that  
10 correct?  
11 A Yes.  
12 Q Did you sign 1365?  
13 A Sixty-five, no. No, I didn't sign it.  
14 Q Did someone -- did you sign any of the  
15 three documents?  
16 A Yes, I signed 1366.  
17 Q Okay. 1366 is which document?  
18 A The October 10th document.  
19 Q How many meetings were you involved in  
20 leading up to the settlement of the Castano case?  
21 A Probably four to six, in that range.  
22 Q Were they all with the same people?  
23 A Sometimes attorneys sometimes would be  
24 there; sometimes they wouldn't, different attorneys.  
25 Q Were there particular sticking points in

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1 those negotiations?  
2 A Yeah, there were many sticking points.  
3 Q Which ones do you recall?  
4 A I guess the biggest sticking point that --  
5 initially was the percentage of profits, the money  
6 issue, money -- bad lunch.  
7 Q Was most of the discussion over dollars?  
8 A No, it was over lots of other detailed  
9 points about -- you know, lot of legal points, class  
10 actions, opt in, opt out -- many, many issues.

11 Q Do you recall any others at this time?  
12 A In fact, let me look at the agreement and  
13 I will recall. I mean, we had a lot of detail.  
14 Whatever is in the agreement. We negotiated every  
15 single paragraph.  
16 Q Every provision was -- was carefully  
17 debated and discussed --  
18 A Pretty much.  
19 Q -- and negotiated?  
20 A Yes.  
21 Q When you came -- when it came time to  
22 negotiate the Attorney General settlement, did you  
23 participate in those negotiations?  
24 A Yes.  
25 Q With whom did -- well, first of all, who

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1 in your group negotiated, you and who else?  
2 A The Kasowitz firm.  
3 Q Okay. Any particular lawyers?  
4 A Yeah, Mr. Benson here and Mr. Kasowitz and  
5 Mr. Marks was involved, also.  
6 Q Who was on the other side of the  
7 negotiations?  
8 A For the Attorneys General?  
9 Q Yes. Who took the lead in the  
10 negotiations?  
11 A Which Attorneys General?  
12 Q Yes.  
13 A I think -- I guess I would probably say



14 Grant Woods from Arizona was the lead in that --  
15 those negotiations and Warren -- Warren and Woods  
16 pretty much.

17 Q Were others involved, as well?

18 A On occasion, yes.

19 Q Were any documents shown to the Attorneys  
20 General as an indication of what documents you might  
21 be producing?

22 A I don't know.

23 Q Were any -- was any of that done in your  
24 presence?

25 A I just said, I don't know anything that

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1 was done. What kind of question is that?

2 Q Well, if it wasn't -- was anything done in  
3 your presence, any sharing of privileged documents  
4 of Liggett or any other company done in your  
5 presence during those negotiations?

6 A No, I don't know.

7 Q Number one, you were asked just a moment  
8 ago --

9 (Video interrupted)

10 MR. NYHAN: Your Honor, I think that  
11 completes the --

12 (Video playing)

13 Q -- whether other companies could get the  
14 benefits of the settlement agreements that you had  
15 negotiated. Do you recall that?

16           A     Certain benefits, yes.

17           Q     And they obtained those benefits --

18                     (Video interrupted)

19           THE COURT:  Does that complete the portion

20 of the deposition?

21           MR. NYHAN:  I believe it does.  I may need

22 to check.  Can I have just a moment?

23           THE COURT:  Sure.

24                     (Discussion off record)

25           MR. NYHAN:  Apparently there's just a bit

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1   more, much to everyone's relief, I'm sure.

2           THE COURT:  All right.

3                     (Video continues)

4           Q     -- only if they become affiliates of

5 Liggett and Brook; is that right?

6           A     That's correct.

7           Q     Second, with respect to the various

8 documents you were just presented, had you ever seen

9 those documents before today?

10          A     No.

11          Q     Were you familiar with the authors or did

12 you know the authors of those documents?

13          A     No, I didn't know any of the authors.

14          Q     In answering the questions that were put

15 to you, were you -- well, strike that.

16                     Have you reviewed any other documents

17 since yesterday concerning smoking and health

18 issues?

19           A     No.

20           Q     Was your basis for answering the questions

21     that were put to you with respect to the documents

22     therefore based on your personal beliefs, your

23     conferences with lawyers in the Kasowitz firm, your

24     review of the eight documents released by the Court

25     in Florida and what you have read in the Popular

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2508

1     Press?

2           A     That's correct.

3           Q     And on nothing else?

4           A     That's correct.

5           Q     Thank you.

6           A     I should say my review of these documents

7     themselves, as I read them.

8           Q     And by "these documents," you mean the

9     documents that you were handed by counsel just a few

10    moments ago?

11          A     Correct.

12                    (Video stopped)

13                   MR. NYHAN: That concludes it, Your Honor.

14                   THE COURT: All right. We will take the

15    afternoon break. Turn on the lights, please.

16                   Ladies and gentlemen, it's 20 after

17    three. We're going to take the mid-afternoon

18    break. Please do not discuss the case among

19    yourselves or with anyone else. If you're in the

20    jury room at 20 till four, we'll be able to start

21 right at 3:40.

22 THE BAILIFF: Court is in recess.

23 (Jury exits courtroom; recess)

24 THE BAILIFF: All rise, please. This

25 court is back in session.

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1 THE COURT: Would counsel approach the  
2 side bar a minute, please. I don't need the court  
3 reporter.

4 (Side bar, Court and counsel)

5 THE COURT: Are you ready to proceed,  
6 Mr. Matthews?

7 MR. MATTHEWS: Yes, Your Honor.

8 THE COURT: Mr. Nyhan?

9 MR. NYHAN: Yes, Your Honor, we are.

10 THE COURT: Bring them in, please.

11 (Jury enters courtroom)

12 THE COURT: All right, Mr. Nyhan, I  
13 believe you were going to present some further  
14 testimony of Mr. LeBow.

15 MR. NYHAN: Yes, Your Honor, we are. We'd  
16 like to read from Mr. LeBow's testimony of  
17 February 10, 1998, and there isn't much to it.

18 THE COURT: All right. And this is  
19 Mr. Silverman?

20 MR. NYHAN: This is Dan Silverman who will  
21 be reading the answers that Mr. LeBow gave to the  
22 following questions.

23 THE COURT: All right. Again, you're to

24 treat it just as if Mr. LeBow was sitting here on  
25 the stand as you did the video and the other

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1 depositions. And Mr. Silverman will answer the  
2 questions as if he were Mr. LeBow.

3 MR. NYHAN: Thank you, Your Honor.

4 (The following transcript was read.)

5 Q Did you tell the jury yesterday that you  
6 not only settled with the state, that you had  
7 contractually promised to assist the Attorney  
8 Generals and their lawyers in their lawsuits against  
9 these companies?

10 A We -- we agreed to release all of the  
11 documents and to testify if requested, and that's  
12 what we're doing.

13 Q Let me ask you this: A contractual  
14 promise to cooperate with the lawyers and the  
15 parties, that's an important fact, isn't it?

16 A I think it's -- well, you know, yeah.  
17 Yes, it's an important fact. I'm happy we're doing  
18 this.

19 Q And that's an important fact for a  
20 fact-finder to know with respect to testimony, isn't  
21 it, that there's a contractual promise to help one  
22 party?

23 A What is a fact-finder, please?

24 Q The jury.

25 A Oh.

1           Q     Indeed, if you were a fact-finder and you  
2     wanted to evaluate someone's testimony, you'd want  
3     to know whether they got a contractual promise to  
4     cooperate with one party in the lawsuit, wouldn't  
5     you?

6           A     We had a contractual promise to supply all  
7     of our documents, release all of our privileges and  
8     to testify, if requested, and that's what we're  
9     doing.

10          Q     Let me turn you, if I could, Mr. LeBow --  
11     well, let me ask for an answer to that question.  
12     That's an important fact for the fact-finder to  
13     know, isn't it?

14          A     Yes. In that context, yes.

15          Q     Now, turn to the agreement -- the same  
16     agreement we've been dealing with right at the  
17     beginning in one of the whereas clauses labeled E.

18                     Did you find that, sir?

19          A     Yes, I have it.

20          Q     Could you read E to the jury?

21          A     "The Attorneys General acknowledge and  
22     agree that this settlement agreement, including  
23     the cooperation provisions thereof, are important  
24     to the prosecution of their actions against the  
25     non-settling defendants."

1           Q     Now, the agreement has numerous other  
2 provisions requiring you to cooperate with the  
3 lawyers for the state, does it not, Mr. LeBow?

4           A     In what sense?

5           Q     Well, let's turn to 4.3.1.

6                     Okay. Do you have that?

7           A     Yes, I do.

8           Q     All right. Okay. That says that each  
9 settling defendant -- and that's Liggett and Brook,  
10 correct?

11          A     Correct.

12          Q     That says that they will cooperate with  
13 the Attorney General and the attorneys representing  
14 the Attorney General, correct?

15          A     Correct.

16          Q     Okay. Could you turn to 4.3.1 (3), two  
17 paragraphs down.

18          A     Yes.

19          Q     And that's in the middle there. That says  
20 that you've agreed to actively assist the attorneys  
21 representing the Attorneys General in locating  
22 witnesses, et cetera, correct?

23          A     Correct.

24          Q     And you shall -- down here at the end,  
25 Mr. LeBow -- shall actively assist counsel in

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1 interpreting documents relating to litigation. Do

2     you see that?

3             A     Yes.

4             Q     The question is: That's what you were

5     doing here yesterday, Mr. LeBow, isn't it, actively

6     assisting counsel in interpreting documents?

7             A     I think any witness on the stand is doing

8     that. I don't see anything special that's being

9     done there. I was just reading the documents and

10    giving my personal opinion on them.

11            Q     Well, let's turn to 4.3.2 (3), Mr. LeBow.

12            A     That's the same place you are now, right?

13            Q     No, this is 4.

14            A     Okay.

15            Q     You with me?

16            A     Yes.

17            Q     It starts out, quote, offer their

18    employees, close quote.

19            A     Yes, I have it.

20            Q     Okay. And it talks about offer employees

21    to testify in deposition, at trial, correct?

22            A     Correct.

23            Q     And you've come here voluntarily at the

24    request of the state, have you not, sir?

25            A     That is correct.

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2514

1            Q     You believe you have fully cooperated with

2    the Attorneys General and their lawyers pursuant to

3    that agreement, correct?

4            A     As I say, we waived our attorney/client



5 privilege, we released all of our documents, and

6 I've been here, you know, appearing as a witness.

7 Q And you believe you've cooperated fully,  
8 correct?

9 A As of right now, yes.

10 Q Now, another part of the agreement was  
11 that the Attorneys General demanded that you,  
12 Bennett LeBow, personally make a statement, correct?

13 A Correct.

14 Q Not Liggett or Brook, but you, Bennett  
15 LeBow.

16 A Either way.

17 Q Well, it was a personal statement by  
18 Bennett LeBow, correct?

19 A On behalf of myself and on behalf of  
20 Liggett and Brook.

21 Q And as a matter of fact, it was written  
22 right in the agreement with the language above,  
23 quote, I, Bennett LeBow, close quote, correct?

24 A Correct.

25 Q And that was a negotiated statement,

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2515

1 correct?

2 A The lawyers negotiated some of the words,  
3 yes.

4 Q There were several drafts of that, correct?

5 A I wasn't aware of that. I don't know.

6 Q Had you ever negotiated a personal

7 statement that you were going to make before?

8 A Not that I recall.

9 Q Now, during these negotiations, to your  
10 knowledge, there was nothing they asked you to say,  
11 no statement they required that you didn't agree to  
12 say; isn't that true?

13 A That's absolutely true.

14 Q You did insist on the insertion of one  
15 sentence in there, did you not, and that's the  
16 sentence that says, "I personally am not a  
17 scientist." Do you see that?

18 A I don't know if I insisted upon that or my  
19 lawyers insisted upon that.

20 Q But that was a request from your side?

21 A From our side, I believe so, yes. I'm not  
22 sure of that. I'm not so sure. It could have been  
23 from the other side, too. I don't recall.

24 Q Turn to -- see if this refreshes your  
25 recollection. Turn to your 1997 deposition in the

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1 Broin case at page 93, if you would, please.

2 It's page 93, starting at line 15. And  
3 let me ask you if you were asked this question and  
4 gave this answer.

5 Question: And so you asked for the  
6 insertion of the language, quote, I personally am  
7 not a scientist, period, unquote.

8 Answer: Yes. Obviously I can't give  
9 expert opinions in these types of things.

10 Correct?

11 A Correct.

12 Q And you didn't mean in this statement in  
13 section 4.1 to speak as an expert, did you,  
14 Mr. LeBow?

15 A I'm not a scientist, as I've said many  
16 times.

17 Q And you didn't mean to speak to the jury  
18 yesterday as an expert on any matter of science, did  
19 you?

20 A Not as an expert in science. As you know,  
21 CEO and owner of a tobacco company, I did.

22 Q And your opinions on matters of science  
23 are just that, your personal opinions as a layman,  
24 correct?

25 A Obviously.

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2517

1 Q And everybody has got those, correct?

2 A Everyone has their own opinion, yes.

3 Q Now, let's go to the second sentence of  
4 section 4.1, which is this negotiated statement  
5 we've been talking about, and that's the one that  
6 says, quote, Cigarettes were identified as a cause  
7 of lung cancer and other diseases as early as 1950,  
8 close quote. Do you see that, sir?

9 A Yes.

10 Q Now, you didn't know that at the time you  
11 signed this agreement, did you, that they were

12 identified as a cause of lung cancer as early as  
13 1950?

14 A I was told that by my attorneys, yes.

15 Q Right. You were told that at the time,  
16 correct?

17 A Yes.

18 Q And that was -- you were given that  
19 information by your attorneys?

20 A Well, and I read it in the Popular Press  
21 in cases like this.

22 Q But, I mean, you've stated before, have  
23 you not, Mr. LeBow, that this statement about 1950  
24 was information you got at the time of the  
25 negotiations?

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1 A Or before. They were during the  
2 negotiations, yes.

3 Q Now, you don't personally know that  
4 statement is true, do you?

5 A Well, I saw some documents yesterday which  
6 kind of, you know, indicate it's true.

7 Q You don't -- you didn't look at the  
8 scientific literature to see what was out there, did  
9 you, Mr. LeBow?

10 A No. I am not a scientist. I didn't look.

11 Q And your lawyers aren't scientists or  
12 doctors, are they?

13 A Not to my knowledge.

14 Q Let's go to the third sentence now, if you

15 could, please. That's the one that begins -- well,  
16 actually one, two, three, four, the fourth  
17 sentence. Quote: But like all of you, I am aware  
18 of the many reports concerning the ill-effects of  
19 cigarette smoking, close quote. Do you see that,  
20 sir?

21 A Yes.

22 Q And you didn't need your lawyers to tell  
23 you that fact, did you, that the public had long  
24 been aware of the ill-effects of cigarette smoking?

25 A No.

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2519

1 Q Indeed, you spoke to us yesterday about  
2 your knowledge on the 1964 Surgeon General's report,  
3 correct?

4 A I don't recall yesterday --

5 Q Okay.

6 A -- exactly what I said.

7 Q Well, let me see if this reminds you. You  
8 said that one of the things that was in your mind  
9 when you decided to quit smoking had been the  
10 publicity associated with the 1964 Surgeon General's  
11 report, correct?

12 A That's correct.

13 (Change of reporters, 4:05 p.m.)

14

15

16

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2520

1 Q And when the 1964 Surgeon General's report  
2 came out, Mr. LeBow, that wasn't the first time you as  
3 an individual had heard that smoking might carry health  
4 risks, correct?  
5 A In 1964?  
6 Q Right.  
7 A I don't recall back 30 years.  
8 Q You don't?  
9 A No.  
10 Q Okay.  
11 A Exactly.  
12 Q Okay. Now it's also true, is it not, with  
13 respect to the knowledge of the ill-effects of cigarette  
14 smoking that the warnings have been on the packs since  
15 1966. You know that, don't you, sir?  
16 A Some of the warnings have been, yes.  
17 Q Except for your agreed-upon warning, correct?  
18 A Except for the addiction warning.  
19 Q Now let me go to the next sentence which  
20 begins, quote, We at Liggett, close quote. Do you see  
21 that, sir?  
22 A Yes.  
23 Q Now, again, this is a statement you agreed to  
24 make, correct?  
25 A Correct.

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2521

1 Q That was negotiated with the Attorneys  
2 General, correct?  
3 A Correct.  
4 Q Now when you said, quote, We at Liggett,  
5 close quote, and that sentence goes on to say,  
6 "acknowledge that smoking can cause disease," but when  
7 you said, "We at Liggett," when you made that statement,  
8 you had never checked with any scientists at Liggett  
9 about what their advice or opinion might be on that very  
10 issue, had you, sir?  
11 A That's correct. I don't think we have any

12 scientists, as you know, currently.  
13 Q Now, but you didn't check, did you?  
14 A No, I did not check.  
15 Q So, clearly, when you said on March 20, 1997,  
16 "We at Liggett," what you were talking about was I,  
17 Bennett LeBow, correct?  
18 A No. My lawyers had -- had advised me that  
19 Liggett's documents, you know, supported these  
20 statements; that given that information, I support what  
21 they said.  
22 Q So it was based on what you believed and what  
23 your lawyers told you?  
24 A From the documents that they reviewed over a  
25 period of six months, yes.

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2522

1 Q And you hadn't reviewed those documents?  
2 A I had not personally reviewed the documents,  
3 no.  
4 Q Now it goes on to say that, in the same  
5 sentence about We at Liggett, "acknowledged that smoking  
6 causes certain health problems," correct?  
7 A Correct.  
8 Q Now as you said yesterday, you had been aware  
9 prior to this time about Liggett's prior position which  
10 had been that smoking was a statistical risk factor, not  
11 a proven cause of disease, correct?  
12 A From the previous attorneys I had been aware  
13 of that, yes.  
14 Q And hadn't you been generally just aware of  
15 that from your management of the company over the years,  
16 that the position was that smoking was a statistically  
17 associated risk factor, not a proven cause?  
18 A Again, principally from the attorneys, not  
19 the management per se.  
20 Q But you clearly knew that at the time?  
21 A Oh, yes. That was the industry position at  
22 the time.

23 Q Now, isn't it true that when you agreed in  
24 this negotiation to say, quote, cause, close quote, and  
25 include the word "cause" in that sentence, you didn't

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1 even know what was the difference between a risk factor  
2 and a cause; isn't that true?  
3 A As I said before, I am not a scientist.  
4 Q So the answer to my question is no, you  
5 didn't know the difference, did you?  
6 A The scientific difference? No.  
7 Q Okay. Now, sir, let me turn you to the next  
8 section in 4.1. We will go right down it. Also, the  
9 last sentence it talks about, We at Liggett. And it  
10 went on to say that nicotine is addictive; correct, sir?  
11 A Correct.  
12 Q And again, with respect to the, We at  
13 Liggett, you hadn't checked with any scientists at  
14 Liggett about this at the time you made that statement,  
15 correct?  
16 A Again, it came from my attorneys, not from

17 checking with scientists that we don't have, so I had no  
18 scientist to check with.

19 Q Okay. So the answer is no?

20 A No.

21 Q As a matter of fact, at that time you hadn't  
22 checked with any other scientist, had you, Mr. LeBow?

23 A No.

24 Q Now in two of these -- section 17.3 and  
25 section 17.4 -- two of these sections are only of value

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1 to Liggett if one of the other companies loses a case;  
2 correct?

3 A Yes.

4 Q And based on these provisions and the other  
5 provisions of the agreement, including your cooperation  
6 provisions, it's true that Brook has an economic  
7 incentive to see the other tobacco companies lose their  
8 litigation against the Attorneys General; isn't that  
9 true?

10 A Well, you are looking at 17.3 and 17.4 only.  
11 Theoretically, you know, you can make that -- kind of  
12 make that statement, but that's not the intent here.

13 Q My question is, Brook has an economic  
14 incentive to see the other tobacco companies lose their  
15 litigation against the Attorneys General; correct or  
16 not?

17 A I don't think that's correct because 17.3 and  
18 17.4 are totally under the control of the other tobacco  
19 companies. We have no control over this.

20 Q Well, not limiting it to 17.3 and 17.4,  
21 Brook, but including that, Brook has an economic  
22 incentive to see the other tobacco companies lose in the  
23 litigation against the Attorneys General; isn't that  
24 true?

25 A I don't see how you say that. On what basis?

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2525

1 Q Okay. Could you turn, Mr. LeBow, to the  
2 deposition -- do you have it?

3 A I have it. I have it.

4 Q That's 91. Could you turn to page 162, line  
5 16. See if you remember being asked these questions and  
6 giving these answers:

7 Question: Based on all of this, you have an  
8 economic incentive to see the other tobacco companies  
9 lose pending litigation against the Attorney Generals;  
10 isn't that correct?

11 There was an objection. And then you  
12 answered --

13 Well, I would think even on a competitive  
14 basis. If I have a settlement and they lose, I am  
15 obviously in a competitive advantage, forgetting any  
16 agreements, and that would be true of almost anyone.

17 Question: And so the answer would be yes; is  
18 that correct?

19 Answer: The answer would be yes.

20 A The answer is yes, with that qualification  
21 prior that you have there. The answer I gave on "a



22 competitive basis," it would be true also if you had a  
23 judgment against them. They would have a competitive --  
24 MR. MATTHEWS: I'm sorry. It's beyond the  
25 designation we had listed. I don't know if there's an  
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1 addition.  
2 MR. NYHAN: I think that's the tail end of  
3 it. We will finish down to line 23.  
4 MR. MATTHEWS: I have through line 14. Let  
5 me read it real quick.  
6 (Pause)  
7 MR. MATTHEWS: I have no objections.  
8 MR. NYHAN: Okay. Let me just put it back in  
9 context.  
10 You answered: Well, I would think even on a  
11 competitive basis if I have a settlement and they lose,  
12 I am obviously in a competitive advantage, forgetting  
13 any agreements, and that would be true of almost anyone.  
14 Question: And so the answer would be yes; is  
15 that correct?  
16 Answer: The answer would be yes.  
17 A The answer is yes with that qualification  
18 prior that you have there. The answer I gave on "a  
19 competitive basis," it would be also true if you had a  
20 judgment against them. They would have a competitive  
21 advantage. So it works both ways. So I don't see what  
22 you are talking about.  
23 Q Those were the questions you were asked and  
24 the answers you gave, correct?  
25 A That's what it says.

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1 MR. NYHAN: That concludes it, Your Honor.  
2 May we be heard at sidebar for a moment?  
3 THE COURT: All right.  
4 (Side-bar conference held outside the hearing  
5 of the jury)  
6 MR. NYHAN: Your Honor, I request permission  
7 to publish to the jury at this time the fact that  
8 Mr. LeBow and his companies have signed an agreement  
9 with plaintiffs' counsel in this case, and it's relevant  
10 to show the bias that that witness has in the testimony  
11 that was offered. These folks are down in an Alabama  
12 class action --  
13 THE COURT: Yeah, okay.  
14 MR. NYHAN: -- that's been -- he referred to  
15 this in the testimony he gave here, and I think it's  
16 only fair that we be allowed to tell the jury that among  
17 the parties he settled with is this law firm.  
18 MR. MATTHEWS: Judge, they are now attempting  
19 to put on their own evidence. He can do this over our  
20 objection if he wants to in his case in chief. We've  
21 read that deposition. We designated portions; they've  
22 counter-designated portions, and now he is getting into  
23 an area that's totally different. If he wants to put it  
24 in his case, that's --  
25 THE COURT: I don't think I will allow it at  
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1 this time.  
2 MR. NYHAN: All right.  
3 THE COURT: But I am not sure how I would  
4 rule on it if you attempt to present it in your case.  
5 MR. MATTHEWS: And I would like him to advise  
6 me if they intend to read it out of a deposition, if  
7 they would provide that to me.  
8 MR. NYHAN: I wanted to check with you before  
9 we did anything on that. I take it you denied my  
10 request to do that at this point?  
11 THE COURT: At this time.  
12 MR. NYHAN: Again --  
13 THE COURT: Because I think -- I don't think  
14 it's a part of what was designated by the plaintiff, and  
15 you were reading your portions to the deposition in  
16 answer to what they read. So, that does not mean I  
17 would not consider it. Whether I would allow it or not  
18 is another matter.  
19 MR. NYHAN: We believe that we are entitled  
20 to show if the witness were here live, we would be able  
21 to bring out on cross-examination that he had signed  
22 this agreement. We think it's appropriate to do so at  
23 this point, and if you would, Your Honor denies that,  
24 again, I would renew my motion for mistrial.  
25 THE COURT: All right.

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1 (Side-bar conference concluded; proceedings  
2 resumed before the jury panel.)  
3 THE COURT: Ladies and gentlemen, the next  
4 witness is going to take a long time to testify, so what  
5 we intend to do is have Mr. Wilner call the next witness  
6 in just a few minutes -- not quite yet, Mr. Wilner --  
7 and maybe go somewhere between five and 5:30.  
8 Mr. Wilner will get at a point where he can stop in the  
9 testimony, and that witness will be back tomorrow.  
10 Also, I think it's probably a good time right  
11 now to tell you that as far as the jury is concerned,  
12 the trial will not -- when we recess Friday, we will  
13 resume Tuesday morning, since Monday is a holiday. And  
14 the attorneys and I may be working, but we don't expect  
15 you to be here Monday; and I don't know if you made  
16 plans or anything, but there's not going to be a problem  
17 with that with us expecting you to be here Monday.  
18 All right. Call your next witness, please,  
19 Mr. Wilner.  
20 MR. WILNER: Thank you, Your Honor. The  
21 Maddox family calls Dr. Allan Feingold.  
22 THE COURT: All right. Dr. Feingold, if you  
23 can maneuver through there, if you will come on up, and  
24 have a seat on the witness stand, and I will swear you  
25 once you are seated, sir. Good afternoon.

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1 THE WITNESS: Good afternoon, sir.  
2 THE COURT: Would you have a seat, please,

3 and raise your right hand.  
4 Do you swear that the testimony you are about  
5 to give will be the truth, the whole truth and nothing  
6 but the truth?  
7 THE WITNESS: I do.  
8 THE COURT: Thank you, sir. Mr. Wilner, you  
9 may proceed.  
10 MR. WILNER: May it please the Court.  
11 I. ALLAN FEINGOLD,  
12 having been produced and first duly sworn as a witness,  
13 testified as follows:  
14 DIRECT EXAMINATION  
15 BY MR. WILNER:  
16 Q Dr. Feingold, good afternoon.  
17 A Good afternoon.  
18 Q Where have you been today?  
19 A Waiting in your office.  
20 Q Where did you come from?  
21 A Miami.  
22 Q Tell us what your life is like in Miami.  
23 A It's wonderful. It's busy.  
24 Q What do you do?  
25 A Well, I am a father of three children, a  
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1 husband, member of a family. And professionally I am a  
2 lung specialist. I take care of people who have various  
3 diseases of the lungs, all kinds of different diseases  
4 of the lungs, but a lot of lung cancer, chronic  
5 bronchitis, emphysema, and some things that are less  
6 serious like asthma and pneumonia, things of that  
7 nature.  
8 Q Where do you take care of people?  
9 A Well, my office is in the -- in a hospital.  
10 It's in a big community hospital which is South Miami  
11 Hospital, part of the Baptist health system which is a  
12 four-hospital system, the largest not-for-profit  
13 hospital system in South Florida.  
14 I am the chief of the division of pulmonary  
15 medicine at South Miami Hospital, so I run the  
16 department, and I take care of patients, and I help to  
17 coordinate activities of the pulmonary department with  
18 the other departments in the hospital.  
19 Q Push the mike away or lean back, because they  
20 are real hypersensitive to the little p's and things.  
21 Thanks.

22 All right. So you tell the jury, please, what  
23 kinds of responsibilities you have as chief of the  
24 pulmonary department in South Miami Hospital systems.  
25 A Well, South Miami Hospital is a  
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1 community-based hospital. It's not an academic center;  
2 it's not a place where research is done. It's a place  
3 where a lot of patients are taken care of.  
4 So my responsibilities in that division are to  
5 make sure that the quality of care that's given to  
6 individual human beings in our institution is the best  
7 it can be; to run the place the way it's supposed to be

8 run; to make sure that the quality of the people who  
9 work there is high; that the equipment that's used is in  
10 good working order; that the results that we give to  
11 other doctors from tests that we do, special tests on  
12 the lung function of human beings is perfect and of a  
13 most accurate amount -- degree that we can.

14 So those are the kind of technical things that  
15 I am responsible for.

16 I am responsible to make sure that the people  
17 that work in my department and the physicians who are  
18 associated with the division of pulmonary medicine  
19 function well in the environment of the hospital. You  
20 know, a hospital is like a big city, and it's a living  
21 thing, if you wish. That's not always easy. There are  
22 all kinds of people to work with.

23 Q Do you treat patients?

24 A Every day.

25 Q When these patients come into the hospital,  
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1 how do they come to see you?

2 A Well, they come to see me in various ways.  
3 First of all, I have been there for 16 years, so I have  
4 a big practice. I have got thousands of people that  
5 come -- that have seen me over the years, and some of  
6 them come back for various reasons. Most importantly,  
7 patients are sent to me by other doctors, and since I am  
8 a subspecialist really, it's mostly other specialists  
9 that send patients to me. Some family practitioners,  
10 but also cardiac specialists, for example, or kidney  
11 specialists, or surgeons will ask me to see one of their  
12 patients before and after an operation to help with the  
13 management of a patient.

14 Patients see me both on an outpatient basis,  
15 meaning they come to my office which is in the hospital  
16 for me to examine them and look at their x-rays and give  
17 them an answer as to what's wrong with them and tell  
18 their doctors what I think should be done. And they  
19 come to me because they have no choice in the hospital,  
20 meaning they are sick in bed. Sometimes just on the  
21 floor; sometimes in the intensive care unit; sometimes I  
22 respond because they are having a cardiac arrest or some  
23 other disaster or that kind of thing.

24 Q Do you have partners who you practice with at  
25 the hospital?

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1 A I have a partner, thank God. He is watching  
2 the shop at the moment. And, also, there are multiple  
3 other pulmonary doctors who are associated with our  
4 division of pulmonary medicine.

5 Q Do you -- are you -- do you have like rounds  
6 or rotations at different times where you are  
7 responsible for staying on?

8 A Right. As a matter of fact, I have a lot of  
9 personal duty time. The -- there's only one other  
10 partner. So, in fact, we work 12 days in a row and then  
11 take two days off, which is exactly what we do.

12 Q Do you ever have to come in in the middle of

13 the night?

14 A When you are tucked in bed, yes. While  
15 everybody else is sleeping I'm in the hospital often.  
16 Not every day, but maybe two times a week or four or  
17 five times a month, something like that. We do have  
18 junior doctors who work in the middle of the night, but  
19 they oftentimes need us to come and give an opinion as  
20 to what's going on.

21 Q Do you have the ultimate responsibility for  
22 the pulmonary status of everyone in the hospital who  
23 is -- when you are on?

24 A For the patients who are in my practice, yes;  
25 and for the patients who are served by the technicians  
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1 and therapists under my direct supervision, yes,  
2 absolutely.

3 Q Do you have anyone above you to ask if things  
4 get bad?

5 A Pulmonary-wise?

6 Q Yeah.

7 A No, I am afraid the buck stops with me which  
8 is sometimes scary. But, you know, we live in a  
9 connected world, and so I spend a great deal of time on  
10 the computer. We have a tremendous access today to  
11 national and international experts of every kind for  
12 difficult problems in lung medicine, or any kind of  
13 medicine. So, we resort to conferencing and getting  
14 information from all kinds of people. So, if people  
15 come to me with a question that I can't answer, I find  
16 the answer.

17 Q Do you -- do you keep track of how many hours  
18 you spend in your profession?

19 A Not really. I actually -- no. As a matter  
20 of fact, I really more -- I have tried to estimate it.  
21 At times in the past people have asked me, but it's  
22 really difficult. I mean, the fact is that I work,  
23 let's say, for 12 days in a row. I am on that whole  
24 time, and 2:00 in the morning I get a phone call. I  
25 mean, I get many, many phone calls. I am working. At

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1 2:00 in the morning I am working. I have to be awake  
2 and make a decision.

3 That's work. I spend a lot of time studying  
4 every single day. That's work. Most people would call  
5 it work. I -- actually though, what I track is how much  
6 time I spend with my children. I don't really track how  
7 much time I spend with work because work is all the  
8 time.

9 Q Do you know what academic medicine is?

10 A Of course.

11 Q What is it?

12 A It's the kind of medicine that goes on in  
13 university teaching hospitals, and it's the kind of  
14 medicine that supports research, the professorial  
15 production of research and of new doctors.

16 Q Do you respect that type of medicine?

17 A Love it. Respect it.

18 Q Do you practice it?  
19 A No. That's not what I am. I was in that  
20 arena for many years as a student and as a resident and  
21 as a fellow. Did research. I mean, I was there, and  
22 then when I was -- when I -- after my training in  
23 Montreal, Canada, which is where I am originally from, I  
24 continued to participate in the academic center for a  
25 while. But then I was recruited to come to Miami in  
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1 1982, and I have been at South Miami Hospital which is a  
2 community hospital, not an academic hospital, ever  
3 since.

4 Q Tell us where you grew up and went to medical  
5 school, if you would?

6 A Well, I grew up in Montreal -- Montreal,  
7 Quebec, Canada, and I went to college there. I went to  
8 high school and college in Montreal. From Montreal I  
9 went to McMaster University Medical Center in Hamilton,  
10 Ontario. That was after my Bachelor of Arts degree.  
11 And I did my medical school there at McMaster, which was  
12 a wonderful place with inspiring professors.

13 After McMaster Medical School I returned to  
14 the McGill University teaching system. I went to McGill  
15 as undergraduate. And I had the good fortune to be  
16 accepted as an intern at the Royal Victoria Hospital  
17 which was in the 1970s, probably still today Canada's  
18 premier medical institution. So I did my internship and  
19 residency at the Royal Victoria Hospital.

20 Q In what city?

21 A In Montreal.

22 Q Grew up there?

23 A Yeah.

24 Q And you were a Canadian citizen by birth?

25 A No, I was born in Tel Aviv, Israel. My  
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1 parents escaped from wartime Germany and Poland. Met in  
2 Israel. I was born in Israel, and my parents, then  
3 weary from wars and fighting, and my father was a  
4 decorated hero --

5 MR. NYHAN: Your Honor.

6 THE COURT: Are you objecting? I'll sustain  
7 the objection, Mr. Wilner.

8 A Anyway, they left and went to Canada. So --  
9 and then I grew up in Canada. My parents took me to  
10 Canada when I was a baby. Grew up in Montreal.

11 Q As a Canadian citizen?

12 A I became a Canadian citizen.

13 Q And went to school -- public school in Canada  
14 and on through medical school?

15 A Correct.

16 Q What were you interested in in medical  
17 school?

18 A Well, I was interested in a few things. I --  
19 in medical school I was influenced by pulmonary medicine  
20 in general. My medical school --

21 Q Pulmonary means what?

22 A Lung medicine.

23 Q Okay.

24 A And my medical school was in Hamilton,  
25 Ontario. Hamilton is an industrial town with big  
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1 factories, steel companies -- Steel Company of Canada,  
2 that kind of thing. And I became more and more  
3 interested in the diseases of lung that are -- that  
4 occur in people who work, work in factories, mines,  
5 things of that nature. So, I became increasingly  
6 interested in occupational -- it was called occupational  
7 lung disease.

8 So with that interest I left Hamilton, went  
9 back to Montreal to the Royal Victoria Hospital, did  
10 internal medicine and then pulmonary or lung medicine.

11 Q Did you study lung medicine as kind of a  
12 specialty when you were in the -- in the years following  
13 medical school when you were still in your training?

14 A Yes. Well, I graduated medical school in  
15 1975. Now, at that point I was a doctor. That was -- I  
16 graduated MD degree. But after you graduate with an MD,  
17 you still have a lot of training and learning you have  
18 to do. So with the MD degree I went into internship.  
19 Everybody does. In internship I did internal medicine  
20 first and then I did pulmonary medicine. Pulmonary  
21 medicine is a subspecialty of internal medicine. It's  
22 part of internal medicine.

23 Q Did you study under renowned physicians at  
24 the Royal Victoria Hospital?

25 A I had the privilege, yes.  
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1 Q And did you decide to dedicate your  
2 professional life to the study of the diseases of the  
3 lung and related matters?

4 A I did. Influenced I think largely by Peter  
5 Parady who was the programs professor and chief of  
6 pulmonary medicine at the Royal Victoria Hospital. I  
7 decided to pursue that, yes.

8 Q So, where did this quest take you?

9 A Well, it took me to years of further study at  
10 the Royal Victoria Hospital, at the Montreal Chest  
11 Hospital Center, at the Montreal General Hospital, at  
12 various other pulmonary hospitals and sanitorium in  
13 Montreal and outside of Montreal. And I did years of  
14 additional study in the -- and work. Eventually, I  
15 became board-certified, which is a natural course of  
16 things for people who do specialty medicine.

17 Q And it means what?

18 A Well, board certification means that you have  
19 taken a course of study that's designated by a board.  
20 Now there are lots of boards. In the United States  
21 there's a board of -- American Board of Internal  
22 Medicine, for example, and I am board-certified by the  
23 American Board of Internal Medicine. That means that  
24 the ABIM says, look, if a doctor wants to become  
25 board-certified, he has got to have -- or she has got to

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1 have studied these things, spent this number of years,  
2 typically five to seven years after medical school. And  
3 then the doctor is going to have recommendations from  
4 his or her professors, and then the doctor can sit for  
5 special examinations.

6 Q That's here or in Canada?

7 A Well, I did both. I did Canada, I did  
8 Quebec, I did -- because I was just separate, and I did  
9 the United States.

10 Q Do you need to do this to practice medicine?

11 A No. No. You don't have to do it to  
12 practice, but you need to do it for yourself to prove to  
13 yourself that you have mastered the specialty, and you  
14 have to do it oftentimes for billing purposes and other  
15 mundane things like that.

16 I became very involved with board  
17 certification, so I took five board certifications, and  
18 I mean, I took exams for years and years.

19 Q Well, did you pass the exam?

20 A Yeah.

21 Q So you were then -- you moved to the United  
22 States?

23 A Right. Actually, I took a board examinations  
24 in internal medicine and pulmonary medicine in Canada.

25 I mean, American board exams were given in Canada. So,

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1 I took those exams, and I came -- in 1982 I was asked to  
2 join the staff of the -- of South Miami Hospital.

3 Q Why Miami?

4 A Well, I wanted to move. I -- my wife and I  
5 wanted to leave Montreal. We wanted to move to the  
6 United States, and my wife Esther's parents and brother  
7 and sister had already moved to Miami, so it was natural  
8 for us.

9 Q Esther is?

10 A My wife.

11 Q So she had family in Miami?

12 A Correct.

13 Q And so you got a position at the South Miami  
14 Hospital?

15 A I did.

16 Q Which is a -- how is it -- is it a public  
17 hospital or not-for-profit or private -- how does it  
18 work?

19 A It's a big place. It's a large  
20 not-for-profit community hospital. It has technically  
21 speaking about 500 beds. It's part of a 2,000-odd bed  
22 system which is in a small geographic area.

23 Q And they were able to offer you a position in  
24 the department of pulmonary medicine?

25 A Yeah, they wanted me.

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1 Q And did you work at that time under someone  
2 who was at that time the head of the department?

3 A I did. And, unfortunately, he sickened while



4 I was there, and he died.

5 Q And what happened in the years following that  
6 with your position in the hospital?

7 A Well, as a matter of fact, I worked with him,  
8 and eventually it was decided that I should take over.  
9 This was a decision of the hospital and of the board of  
10 the hospital, and I was selected to be the chief after  
11 the previous man died.

12 Q Now, having passed these five board  
13 examinations, did you -- is it your -- or isn't it your  
14 philosophy of your life or of your profession to  
15 continue to study?

16 A Well, medicine -- for most doctors medicine  
17 is very much about studying. For me personally medicine  
18 has a lot to do with studying. Studying is the pursuit  
19 of knowledge and truth and expertise, and it's not just  
20 for itself. You know, it's not just to know. It's so  
21 that when I go into the office the next morning, I will  
22 have the answer for the patient.

23 Now, obviously, we don't know a lot of things.  
24 A lot of things that medicine knows today that we didn't  
25 know ten years ago, tremendous, but there's still huge

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1 things that we don't know. So it's a constant process  
2 of learning. Now, today it's a lot easier to learn than  
3 it was ten years ago, because we don't have to read  
4 medical journals on paper anymore. We can read them on  
5 a computer screen. We can jump from one to another. I  
6 have access to every library in the world practically  
7 through my computer.

8 (Change of reporters, 4:35 p.m.)

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1 Q Well, you have reached a position in the  
2 hospital, or whatever position you have reached, do  
3 you have to keep studying like this all the time?

4           A     Well, I think so. I think so. I think  
5     that there's a huge duty, you know. First of all,  
6     there can be no greater duty than to take care of  
7     sick people for me. So I've got to know what I'm  
8     doing. And knowing the right answer from a year ago  
9     is not enough, obviously.

10           The other issue is that there are special  
11    projects. I've become involved in special projects,  
12    a whole bunch of them. I'm on the board of  
13    governors of the hospital. I was eventually chosen  
14    -- I was chosen to be a chairman of the department  
15    of medicine. I was chairman of medicine for years.  
16    I was --

17           Q     How is that different from chairman of the  
18    department of pulmonary medicine?

19           A     Well, you see, pulmonary medicine is a  
20    part of internal medicine. Pulmonary medicine is  
21    that portion where doctors take care of the internal  
22    diseases of the lungs, diseases like asthma or lung  
23    cancer or pneumonia and so on.

24           There are other parts of internal  
25    medicine, like cardiology. That doesn't mean

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1    surgery. That means the cardiologists make a  
2    diagnosis and figure out what's wrong with people's  
3    hearts. Sometimes a cardiologist, sometimes a  
4    pulmonary doctor will refer a patient for surgery.

5           But, anyway, internal medicine is

6 different than surgery. The broad range of internal  
7 medicine includes all these different specialties  
8 like pulmonary, like cardiology, like kidney, like  
9 endocrine, and all of those, traditionally anyway,  
10 have been lumped together in a big department. So I  
11 was a chairman of that department for a while. For  
12 three years.

13 Q Did you have cardiologists and  
14 endocrinologists and others under, so to speak,  
15 under you?

16 A Well, they weren't under me exactly. But  
17 I guess they elected me so I guess they chose me for  
18 the reason I was supposed to provide leadership.  
19 And I tried to do that. And then I was elected to  
20 be a member of the board of governors of the  
21 hospital for somewhat different reasons. You know,  
22 being on the board of governors gives you a whole  
23 different set of challenges. So there are other  
24 things to study and learn.

25 And then besides that, I became involved

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1 in other projects which require me to study and  
2 devote myself to learning about issues. For many  
3 years I've studied about occupational lung disease  
4 of different kinds. I said I started in Hamilton.  
5 I continued in the United States. I took special  
6 board exams again in the United States. I wasn't  
7 satisfied, took more exams. I became a certified  
8 NIOSH certifier.

9           Q     I'll ask about that in a second.  So you  
10  -- take me back to occupational medicine in Canada.  
11  You were familiar with occupational lung diseases?

12           A     Well, yes.  See, Hamilton, as I mentioned  
13  is a steel town.  Quebec, where I spent most of my  
14  life before coming to Miami, Quebec is a heavy  
15  industrial province where there's mining and  
16  factories and so on.  In fact, a lot of mining.

17                     And patients who we would see in the  
18  hospital were oftentimes those men and some women  
19  who had been exposed to mining situations.  Lung  
20  specialists had to be involved with that because  
21  some of these patients developed diseases of the  
22  lung.  For example, asbestosis.  Quebec, Canada, the  
23  province of Quebec, is the source of almost all of  
24  the asbestos that is ever used in the United States.

25           Q     We'll talk in great detail about this in

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1  the future or as we go on, but did you acquire  
2  special expertise in industrial diseases such as  
3  asbestos-related disease?

4           A     I did.

5           Q     And how does -- in just one sentence, how  
6  does, in terms of being a pulmonologist and looking  
7  at all the diseases of the lungs and how they affect  
8  people, how does -- how do the astestos-related  
9  diseases compare with the cigarette-related  
10  diseases, et cetera?

11           A     Well, they have a special similarity, and  
12     that is the diseases are caused by something from  
13     the outside. They're exogenous. They're from an  
14     outside factor.

15           Q     Which is more significant for the health  
16     of the country?

17           A     From a national perspective, cigarette  
18     smoking induced disease is tremendously more  
19     important from the individual human perspective.  
20     Patients who suffer from diseases caused by  
21     asbestos, of course, are suffering bad. Both things  
22     are bad, but one is enormously more important than  
23     the other in terms of numbers.

24           Q     Are you pledged to fight both -- all kinds  
25     of diseases as part of your profession?

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1           A     That was my oath.

2           Q     Now, tell me then, did you acquire while  
3     you were in Canada some special expertise in looking  
4     at chest x-rays in occupational disease?

5           A     I did.

6           Q     And what is that called?

7           A     Well, in a laboratory hospital and more  
8     importantly in the Montreal Chest Hospital Center,  
9     there was a great deal of interest and concentration  
10    on diseases caused by not just asbestos but coal  
11    dust and silica and a wide variety of other things.  
12    So that's really where my specialized training  
13    started.

14                   We did a tremendous amount of x-ray  
15   analysis work there. And I had the privilege of  
16   working under a renowned radiology specialist. And  
17   I came here to the United States -- when I came to  
18   the United States, I took the opportunity to pursue  
19   study in the NIOSH program.

20           Q     NIOSH being?

21           A     The National Institute for Occupational  
22   Safety and Health.

23           Q     And did you do special study to pass  
24   certain tests of the NIOSH?

25           A     Yes. There's a special test that NIOSH

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1   administers according to U.S. law. There's a  
2   federal law pertaining to this, Federal Mine Safety  
3   and Health Act. And NIOSH administers a program to  
4   identify physicians in the United States who are  
5   specially trained and able to read x-rays and rate  
6   them for diseases caused by occupation.

7           Q     And you brought this expertise with you  
8   when you came to South Miami Hospital in 1982?

9           A     I brought some of it with me and then I  
10   acquired more while I was there.

11          Q     And when did we meet?

12          A     We met in 19- -- I think we met in 1982,  
13   '82 or '83. I believe it was '82, you and I.

14          Q     Time flies. Why did we meet?

15          A     You came -- I remember the day. You came

16 with another attorney to see our laboratory, to tour  
17 our laboratory, pulmonary function laboratory, and  
18 to discuss with me the possibility that I would  
19 contribute to medical legal evaluations of patients  
20 who had been exposed to asbestos.

21 Q Now, why was I interested in that?

22 A Well, I know you were defending some  
23 asbestos companies, companies that had produced  
24 asbestos in the past.

25 Q And why did I want to talk to you? I

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1 mean, don't read my mind, but what was the substance  
2 of the meeting?

3 A The substance was whether or not I could  
4 see and evaluate patients and examine them and  
5 interpret their chest x-rays and give reports and  
6 then subsequently, if necessary, give testimony  
7 pertaining to what was wrong with people who had  
8 been exposed to asbestos.

9 Q Was that something that you had, based on  
10 your training in Canada and in the U.S., felt that  
11 you could contribute?

12 A Yes.

13 Q Did you understand that it might involve  
14 testimony in court?

15 A Well, I didn't really -- I didn't  
16 understand it completely when it began but, yes, I  
17 knew that there had to be resolution of legal  
18 matters and that doctors were needed to provide

19 testimony in courtrooms so that juries could make  
20 decisions.

21 Q Were you -- how did you feel about the  
22 necessity of coming to trial in -- let's just talk  
23 about the 1980s.

24 MR. NYHAN: Your Honor, may we be heard?

25 (Side-bar conference held outside the

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1 hearing of the jury)

2 MR. NYHAN: I would prefer not to have to  
3 make a series of objections as to self-serving  
4 statements. And I hope we're not going to have a  
5 repeat of what we had before.

6 MR. WILNER: I don't know. First, I don't  
7 mean to get into a shouting match with my colleague  
8 here, but a repeat of what we had before, I don't  
9 know what he's talking about.

10 THE COURT: I think he's talking about  
11 Dr. Whelan. You weren't here, but I sustained the  
12 objection to Dr. Whelan's testimony that she was  
13 here as a public service. I think it's self-  
14 serving, Mr. Wilner. I don't think the reasons that  
15 he's here, whether he's being paid to be here or  
16 he's volunteering to be here as a public service or  
17 whatever his motives for testifying, are important  
18 to the issues in this trial.

19 MR. WILNER: No, I wasn't going into that  
20 until the door gets open. In other words, If they



21 ask --

22 THE COURT: I understand that. That's  
23 fine if he wants to say nothing, that's fine. But  
24 what we are attempting to avoid is an unnecessarily  
25 self-serving response that I'm here as a public

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1 service, in effect, however you couch it, you know.  
2 And it appeared that that's what he was about to  
3 say.

4 MR. WILNER: I wasn't going there at all,  
5 but I did intend to ask him whether he's being paid.  
6 I take it that's not --

7 THE COURT: I don't have a problem with  
8 that. If Mr. Nyhan wants to object, that's fine.  
9 But I'm talking about his motives for coming here.  
10 And he's already said he thinks doctors should  
11 testify, that was fairly neutral. They get paid for  
12 testifying normally, but, I mean --

13 MR. WILNER: That's right.

14 THE COURT: But let's say he's here as a  
15 public service. I'm not going to allow that.

16 MR. WILNER: That isn't where I was going.

17 (Side-bar conference concluded;  
18 proceedings resumed before the jury).

19 Q Dr. Feingold, let's go back again to the  
20 '80s. Did you start -- did you set up your  
21 laboratory or part of your laboratory so that it  
22 would -- so that you could do some type of  
23 evaluations on people who had legal claims?

24           A     Yes.   Pulmonary function laboratories are  
25   special places where tests are done on lung

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1   function.   And the reason tests are done on lung  
2   function is typically to help doctors make a  
3   diagnosis.

4               Now, some of the diagnoses that are  
5   important in legal cases are diagnoses of diseases  
6   such as asbestosis or coal workers pneumoconiosis  
7   and other illnesses.   For example, individuals who  
8   have been injured in a fire or explosion have  
9   certain kind of diagnoses.

10              And the point is to have a laboratory  
11   that's capable of providing reliable diagnostic  
12   information.   So I felt in the '80s that our  
13   laboratory was ideally suited for that.   It does, in  
14   any way, for sick patients for other reasons.   And  
15   our laboratory evolved and became much bigger, much  
16   more successful, and much busier because of seeing  
17   patients who were involved in medical-legal cases.

18           Q     Was the hospital that you worked with  
19   fully understanding of this project that you were  
20   undertaking?

21           A     Yes.   I mean, it was well discussed and  
22   explained and understood and certainly it was  
23   supported.

24           Q     Was there any rule inside the hospital  
25   against permitting physicians to enter the legal

1 arena and give their testimony?

2 A No, not at all. I mean, I think that  
3 providing --

4 MR. NYHAN: Your Honor, I think we're  
5 again touching on the same area.

6 THE COURT: I'll sustain the objection,  
7 Mr. Wilner.

8 MR. WILNER: All right.

9 Q Dr. Feingold, were you asked from time to  
10 time to provide testimony in court about a patient  
11 that you had either seen or whose records you had  
12 evaluated?

13 A Yes, certainly.

14 Q And did you -- and I'll get to -- I'll  
15 move on that in a minute, but did you as part of the  
16 initial process of gearing up, so to speak, and  
17 setting up the laboratory, what kind of research was  
18 necessary to do that?

19 A Well, at that time it was mostly medical  
20 literature that had to be reviewed and assessed in  
21 great detail. Medical literature means medical  
22 journal articles that have to be read and  
23 interpreted and categorized and understood so that  
24 we could make sure that the laboratory would do what  
25 had to be done to give definitive answers.

1           The side benefit was that all the other  
2 patients who used the laboratory benefited because  
3 of the increased expertise. Beyond just laboratory,  
4 of course, there was expertise that had to be  
5 acquired in the radiology department, x-ray  
6 department, and my own personal expertise.

7           Q     So how much studying, so to speak, did you  
8 do in connection with the asbestos project?

9           A     Oh, over the years, I don't know. It's so  
10 much. Huge amount of study. It's even hard to  
11 calculate how many hours.

12          Q     Not hours, but how did you do it? What  
13 did you do?

14          A     Well, in terms of asbestos and other  
15 occupational lung diseases which we pursued, what  
16 happened was I began to take special courses of  
17 study. I became a NIOSH certified B reader. I  
18 attended appropriate conferences. We purchased all  
19 the textbooks, started to read literally thousands  
20 of articles, started to categorize and classify  
21 these articles, created our own library,  
22 specifically designed for this, and also muster  
23 resources. Worked with radiologists and  
24 pathologists and other doctors so that we could  
25 provide this kind of service.

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1           Q     Now, during the course -- well, during the

2 course of this project and even before, had you had  
3 training in or exposure to cigarette -- the diseases  
4 caused by cigarette?

5 A The diseases caused by cigarettes are the  
6 most important diseases that lung specialists take  
7 care of in Canada and the United States, so if you  
8 become a lung specialist, you have to study diseases  
9 caused by cigarette smoking.

10 Q When is the first time that you got  
11 acquainted with cigarette-related diseases in  
12 training, in pulmonary training?

13 A The day you walk in the hospital.

14 Q How is that? What do you see?

15 A You see people who are suffering and dying  
16 of lung cancer or chronic bronchitis, emphysema, and  
17 a host of other illnesses.

18 Q Was that true when you went into your  
19 training in Canada?

20 A Absolutely.

21 Q And coming down to the South Miami  
22 Hospital, were you exposed to the same kind of  
23 situation?

24 A Yes. The most devastating illnesses that  
25 I take care of on a routine basis are caused by

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1 cigarette smoking, primarily lung cancer and  
2 emphysema. In Florida this year about 13,000 people  
3 will die of lung cancer. Almost all of those are  
4 caused by cigarette smoking. So every single

5 pulmonary doctor who works in the State of Florida  
6 has that burden practically every single day.

7 Q Now, during the asbestos project, did you  
8 begin or did you continue with a special interest in  
9 cigarette medicine and cigarette-related diseases?

10 A Well, it turns out that they're  
11 intricately related. Asbestos diseases, diseases  
12 induced by asbestos exposure and diseases induced by  
13 cigarette smoking are related. And, in fact, in  
14 patients who have asbestosis, which is a special  
15 disease caused by a lot of asbestos inhalation,  
16 smoking cigarettes very significantly increases the  
17 risk of lung cancer.

18 It's a combination. It's interaction  
19 between asbestosis and cigarette smoking which is  
20 particularly terrible. For asbestos workers who  
21 don't smoke, even if they developed asbestosis,  
22 there's practically no lung cancer. But for  
23 asbestos workers who have asbestosis and smoke,  
24 there's a terrible incidence of lung cancer. So  
25 they're interrelated.

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1 Q Because we've been talking about asbestos  
2 and the asbestos project, fast forward us a little  
3 bit. Does asbestos have anything to do with this  
4 case?

5 A No, not with this case.

6 Q I mean, is there any conceivable

7 possibility that Mr. Maddox's disease was in any way  
8 related to asbestos?

9 A Mr. Maddox's disease was not related to  
10 asbestos. He may have had some limited occupational  
11 asbestos exposure. I don't think he -- he probably  
12 had none, as a matter of fact, but he might have  
13 arguably had some limited. However, x-rays,  
14 particularly CT scans, which are a special kind of  
15 x-ray, demonstrated that there was no sign of  
16 asbestos exposure.

17 Q Was this even a serious issue with you  
18 when you evaluated the case?

19 A Every issue is serious with me. I'm a  
20 very serious type of person, you know. Yes, it was  
21 a serious issue. I had to think about it, but  
22 clearly the patient had no evidence of asbestosis.  
23 And clearly individuals who have much greater, who  
24 have real asbestos exposure or work with asbestos  
25 but who didn't get asbestosis have a risk of lung

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1 cancer which is basically the risk of cigarette  
2 smoking.

3 Q We'll talk about the details in a bit, but  
4 how -- did you then in your study, in your course of  
5 study both for the asbestos project and for your  
6 position at the hospital, get more and more  
7 interested in cigarette medicine?

8 A It was an evolutionary process. It became  
9 clear to me over the years that the people who I was

10    seeing who -- and there were thousands of them --  
11    who had been exposed to asbestos had suffered a  
12    tremendously dangerous double jeopardy situation  
13    where on the one hand they had been exposed to  
14    asbestos and had --

15               MR. NYHAN: Your Honor, objection.

16               (Side-bar conference held outside the  
17    hearing of the jury)

18               MR. NYHAN: Now that he's established that  
19    asbestos isn't relevant, I think it's improper for  
20    him to try to qualify him as an asbestos expert in  
21    this trial. This isn't about asbestos, so let's not  
22    hear any more about it.

23               MR. WILNER: I don't know what kind of  
24    objection that is.

25               MR. NYHAN: Relevance.

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1               MR. WILNER: Well, it was the defense who  
2    brought up asbestos in this case, not the plaintiff.  
3    They brought it up by saying he was around asbestos  
4    at one point. They brought it up but, anyway, I'm  
5    not qualifying him as an asbestos expert, although  
6    he is, and I'm entitled to deal with all the  
7    confounding variables that may come up. And he is  
8    an asbestos -- he is an expert, and I don't care  
9    whether they contend. I'm entitled to disprove  
10   whether asbestos is an issue just like I could  
11   disprove that something else was an issue if I



12 choose to.

13                   What if I think that it's important that  
14 he not be -- we not suggest that radiation is a  
15 cause. Well, maybe I need to go into that. I don't  
16 know. I don't understand the issue.

17                   THE COURT: Hasn't he said asbestos is not  
18 an issue and that he was not exposed to it?

19                   MR. WILNER: Of course. Now he's  
20 objecting that I can't qualify him to say that.

21                   MR. NYHAN: He's already said it and I  
22 didn't object to his saying it. I just know --  
23 we're moving into irrelevant areas, Your Honor.

24                   THE COURT: I'll let him go into a little  
25 bit of his background to qualify him to say that

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1 but, I mean, let's don't spend a whole of time on  
2 this.

3                   MR. WILNER: Can I just say along with --  
4 I think you taught me one thing I still use all the  
5 time. Ninety-five percent of what lawyers think is  
6 going to happen is not going to happen. And I'm  
7 kind of at a loss to know how Mr. Nyhan knows  
8 exactly, supposedly what my questions will lead to,  
9 but they're not.

10                   THE COURT: Well, I don't think he's so  
11 much worried about you as the witness, because you  
12 didn't experience yesterday with Dr. Whelan. And no  
13 matter what questions Mr. Nyhan asked, Dr. Whelan  
14 answered according to her own agenda, and he is

15 obviously concerned that Dr. Feingold will.

16           And I agree with you, it's probably not  
17 going to come to fruition, but Dr. Whelan wanted to  
18 let the jury know that she was here as a public  
19 service. And I kept trying to keep her from doing  
20 that when Mr. Nyhan objected. An that's, I think,  
21 the concern for both of us. I finally instructed  
22 her in front of the jury three or four times, but it  
23 still didn't make any difference. And I guess we're  
24 both a little gun-shy, Mr. Nyhan and me.

25           MR. WILNER: Okay.

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1           THE COURT: So that's all we're talking  
2 about. And so he has made the statement that it has  
3 nothing to do with asbestos and that he's positive  
4 it has nothing to do with asbestos. I'll let you go  
5 into a little bit of his background treating  
6 asbestos patients, if he did, and examining them.

7           MR. WILNER: I wasn't intending to.

8           THE COURT: Okay, thank you

9           (Side-bar conference concluded;  
10 proceedings resumed before the jury)

11          Q    To save time without going into the  
12 different diseases, did you study, did you begin at  
13 one point in your life to make a special study of  
14 cigarette medicine?

15          A    Yes.

16          Q    When? It may be impossible to answer,

17 but...

18 A I think the process has been going on with  
19 me for more than 20 years, certainly for the last 15  
20 years intensely, and involved with other kinds of  
21 information about cigarette smoking and disease for  
22 the last, say, five years.

23 Q Did you have occasion to make a special  
24 study of cigarette medicine with me?

25 A Oh, yes.

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1 Q Why?

2 A Because initially because of the impact of  
3 cigarette smoking on asbestos workers, and  
4 subsequently because of what we learned about the  
5 activities of tobacco industry.

6 Q Now, in connection with your work on  
7 asbestos with me, did you and I collaborate on a  
8 book?

9 A Yes, we did.

10 Q And is this the book?

11 A It is.

12 Q And the title is what?

13 A "Asbestos Medicine on Trial."

14 Q By Norwood S. Wilner and Allan Feingold?

15 A Correct.

16 Q That's you and that's me?

17 A Correct.

18 Q And this was published?

19 A '96, '5.

20 Q And the purpose of this book was what?

21 A The purpose was to state clearly for  
22 physicians, like myself involved with occupational  
23 lung disease, and for attorneys like you and for  
24 judges who will need to make decisions and for  
25 others involved in this kind of difficult task of

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1 deciding what had caused different people's  
2 diseases, stating the issues, explaining the basis  
3 for making decisions, putting forth the science,  
4 doing some analysis of what the problems were.

5 Q And what kind of subjects, without -- we  
6 won't read from it or anything not in detail, just  
7 what kind of issues are covered?

8 A Issues of causation, of diagnosis, of  
9 cause and effect, of pulmonary function testing, of  
10 different specific diseases that are related, and  
11 subsequent volumes not finished yet, cancer and  
12 mesothelioma and other illnesses.

13 Q Is there a chapter on cigarette disease in  
14 this book?

15 A There is as it pertains to asbestos  
16 diagnosis mostly, because the section on cancer is  
17 yet to come.

18 Q And did that require research?

19 A Of course.

20 Q And did you at some time during this  
21 process begin to research not only the published

22 literature but documents that might have come that  
23 were unpublished?  
24 A Yes. I did.  
25 Q And how did you begin to acquire documents

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1 that had not been published in the medical  
2 literature but which had been authored by the  
3 cigarette industry?

4 A Well, let me just reach for one thing here  
5 in my briefcase if I can find it. On July 19,  
6 1995 --

7 MR. NYHAN: Your Honor, may we be heard?  
8 (Side-bar conference held outside the  
9 hearing of the jury)

10 MR. NYHAN: The doctor has just identified  
11 what I expect is going to be an an article published  
12 in July 19, 1995 in the Journal of the American  
13 Medical Association that reports on a number of  
14 different documents stolen from Brown & Williamson  
15 Tobacco Company by a paralegal who worked for a law  
16 firm. And they raise privilege issues which I  
17 understood you were going to resolve before we get  
18 into this. So apparently we haven't resolved this,  
19 so we object.

20 THE COURT: Are these Brown & Williamson  
21 documents?

22 MR. NYHAN: Yes.

23 MR. WILNER: Your Honor, he's not going to  
24 read from any documents before Your Honor rules on

25    them, nor is he going to read the contents.

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1                   THE COURT:  What's he going to say about  
2   the articles?

3                   MR. WILNER:  He's going to say it was the  
4   reason that he began to do more intensive research  
5   on the issue of cigarettes and disease.  He's going  
6   to -- we're going to describe it in general terms,  
7   the fact that there are documents we've already  
8   established.  Perfectly reasonable to talk about the  
9   fact that there are documents.

10                  MR. NYHAN:  We believe Your Honor should  
11   rule on the privilege issues so that we're all  
12   clear, and we don't have unnecessary problems before  
13   we get into this.

14                  MR. WILNER:  Wait a minute.  Of these  
15   documents, there aren't five percent that they're  
16   asserting a privilege claim.  So even if we forget  
17   about the privilege claim, even if we throw out  
18   tomorrow all the privilege documents --

19                  THE COURT:  Is he going to talk about a  
20   particular document?

21                  MR. WILNER:  Right this second?

22                  THE COURT:  Yes.

23                  MR. WILNER:  No.

24                  THE COURT:  Just read an article and based  
25   on that article he decided to get involved?

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1           MR. WILNER: Yes. He's going to talk  
2 about the fact -- and, again, I don't know exactly,  
3 but I'm going to try and get -- again, this is like  
4 the parade of homes. I think I can ask questions  
5 that are permissible. We're not going to violate  
6 any privilege. I think he can say that at the time  
7 that he -- that this article, what it describes in  
8 general, is not going to violate any privilege until  
9 we have a hearing. But 90 percent of these things  
10 aren't privileged anyway.

11           THE COURT: I'll take your representation  
12 on that, Mr. Wilner.

13           MR. WILNER: Okay.

14           (Side-bar conference concluded;  
15 proceedings resumed before the jury).

16           Q     Dr. Feingold, we were talking about an  
17 article you read in the Journal of the American  
18 Medical Association?

19           A     Actually I was about to say that on  
20 July 19, 1995, the Journal of the American Medical  
21 Association published what they called several  
22 highly unusual articles.

23           Q     All right.

24           A     In fact, the whole issue.

25           Q     Let me tell you right now I'll ask you not

1 to tell us about the specifics of any documents that  
2 are described in those articles, but just tell us in  
3 general why that was important to you.

4 A It was important to me because of what was  
5 described. Without telling you the specifics about  
6 the individual articles or how they came to the  
7 attention of the Journal of the American Medical  
8 Association --

9 Q You can tell us about the articles. Just  
10 tell us about -- don't read from any of the  
11 documents described in the articles or tell us the  
12 contents of the documents that the article  
13 describes.

14 A Okay. Let me see if I understand.

15 Q Yes.

16 A I think I can do it. I think I can do it.  
17 And the point is this. There's an editorial in this  
18 issue of the Journal of American Medical  
19 Association. This editorial is something unique.  
20 I've never seen it before, sort of thing. It was  
21 signed by every editor of the Journal of American  
22 Medical Association and every member of the board of  
23 the American Medical Association.

24 And it said things that shocked every  
25 doctor that read it and certainly shocked me. And

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1 when I read that documents that had come to the  
2 attention of the American Medical Association



3 demonstrated that research conducted by tobacco  
4 companies as to the deleterious health effects of  
5 tobacco was often more advanced and sophisticated  
6 than studies by the medical community and that  
7 executives at Brown & Williamson knew early on that  
8 tobacco use was harmful and that nicotine was  
9 addictive and debated whether to make the research  
10 public, that the industry decided to conceal the  
11 truth from the public, that the industry hid their  
12 research from the courts by sending the data through  
13 their legal departments, their lawyers asserting  
14 that the results were immune to disclosure and  
15 litigation because they were privileged by a lawyer-  
16 client relationship, that despite their knowledge to  
17 the contrary, the industry's public position was and  
18 continues to be that the link between smoking and  
19 ill health was not proven, that they were dedicated  
20 to determining whether there was such a link and  
21 revealed this to us, the public, that nicotine was  
22 not addictive.

23               When I read these things, and when I read  
24 that it was the opinion of the entire board of the  
25 American Medical Association and the entire

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1 editorial board of the Journal of American Medical  
2 Association that the tobacco industry in general,  
3 and Brown & Williamson in specific, had deceived the  
4 American public and specifically deceived the  
5 American medical community, I wanted to see what

6 they were talking about. I wanted to see exactly  
7 which documents they were talking about. I wanted  
8 to read them for myself.

9 MR. NYHAN: Your Honor. Move to strike.

10 (Side-bar conference held outside the  
11 hearing of the jury)

12 MR. NYHAN: What we've had is a blatant  
13 attempt to bolster his testimony through hearsay  
14 opinion of all these other folks that he's just  
15 described.

16 THE COURT: Do you intend to put the  
17 journal into evidence?

18 MR. WILNER: Well --

19 THE COURT: Or the article?

20 MR. WILNER: It did come in in the last  
21 trial in the Karbiwnyk case. It may be relevant. I  
22 didn't offer it right this second as an exhibit, but  
23 I suppose I could.

24 THE COURT: Well, no, I think I'd instruct  
25 the jury at this point to disregard his statement

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1 that everybody signed it and everybody on the board  
2 and everybody on the thing. I mean, why is that  
3 permissible?

4 MR. WILNER: Well --

5 THE COURT: If the article is not going  
6 in? I mean, so far we know that he read an article,  
7 that everyone apparently who has any medical sense

8 at all agreed with, okay. And then he goes on to  
9 say that that article says that Brown & Williamson  
10 knew all of these things ahead of time. I mean --

11 MR. WILNER: If the objection is  
12 hearsay --

13 THE COURT: It seems that --

14 MR. WILNER: -- I can rephrase it.  
15 There's no problem.

16 THE COURT: He wants me to strike it. He  
17 wants me to tell the jury to disregard that portion.

18 MR. WILNER: Okay. But, Your Honor, I  
19 guess, and I understand it's Your Honor's position  
20 that all objections be made here but, I mean, as I  
21 understood it we can at least object and give  
22 grounds. And if so, if there's a hearsay objection,  
23 fine. We'll interrupt him and start again, I guess.

24 THE COURT: Well, the reason I asked you  
25 to come over here this time, I can do it that way;

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1 but, I mean, if the book is going to go in anyway, I  
2 would take a different view. It's obviously  
3 hearsay, and I'd make you wait to do it. But I'm  
4 going to tell the jury to disregard it and then  
5 introduce it into evidence later, perhaps.

6 MR. NYHAN: But, Your Honor, I don't think  
7 it's admissible.

8 THE COURT: I don't think it is either,  
9 but that's why I'm asking him if it's going in.

10 MR. WILNER: Well, we know it got in -- it

11 was admissible and found to be admissible in the  
12 last case because of -- I'm not sure why, because I  
13 think there was some -- the door was opened by  
14 something else.

15 THE COURT: It could be, but it hasn't  
16 been; and I'm going to tell them to disregard the  
17 opinions that Dr. Feingold has expressed that other  
18 people have made certain determinations, okay?

19 MR. WILNER: Okay. Sure.

20 MR. NYHAN: And while we're here, we  
21 object under Section 90706 to this attempt to use  
22 what is purported to be an authoritative  
23 publication. We can only do that on cross. He  
24 can't do this on direct. This is improper direct  
25 examination. And we ask that you strike the whole

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1 answer and tell the jury to disregard it, because  
2 it's an improper use of this magazine. Counsel  
3 should have known better. And I've already been  
4 forced to make --

5 THE COURT: I think you could have asked  
6 him, you know, what caused him to do that. I read  
7 an article concerning it and I was so incensed that  
8 I decided to do this.

9 MR. WILNER: Right.

10 THE COURT: But now you had him going to  
11 tell what the article says, what it does. You know,  
12 you've been very careful not to quote it.

13 MR. WILNER: That's right.  
14 MR. NYHAN: But he did.  
15 THE COURT: But he just summarized it.  
16 MR. NYHAN: He's read it.  
17 MR. WILNER: Well, whether a doctor can  
18 summarize a learned treatise is a good question but  
19 I'm --  
20 THE COURT: He might be able to, but to  
21 bolster his credibility as a witness, I don't think  
22 you can do that.  
23 MR. WILNER: Well, fine.  
24 THE COURT: If that article is relevant to  
25 this case in some other way other than to bolster

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1 Dr. Feingold's credibility, then that's what I was  
2 talking about, I would allow it.  
3 MR. WILNER: Sure.  
4 THE COURT: But right now you're talking  
5 about why he is doing this. You're not asking him  
6 about this case. You're asking him about  
7 Dr. Feingold and what is he doing here.  
8 MR. WILNER: Right.  
9 THE COURT: And he's saying I saw this  
10 article --  
11 MR. WILNER: Right.  
12 THE COURT: -- that so incensed me that I  
13 decided to do this.  
14 MR. WILNER: Right.  
15 THE COURT: And not only did it incense

16 me, everybody in the whole medical professional  
17 agreed with it --

18 MR. WILNER: I agree. I think that's  
19 gratuitous. I agree.

20 THE COURT: -- and signed it and  
21 everything else. And so I'm going to tell them to  
22 disregard that, that Dr. Feingold is here to give  
23 his opinion, not anybody else's.

24 MR. WILNER: Absolutely. I agree.

25 (Side-bar conference concluded;

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1 (Proceedings resumed before the jury)

2 (Change of reporter, 5:10 p.m.)

3 THE COURT: Ladies and gentlemen, I'm  
4 going to ask that you disregard that portion of  
5 Dr. Feingold's statements where he gives opinions of  
6 other people. He is here -- he's called as an  
7 expert witness to give his opinion, but not the  
8 opinions of other people.

9 Please disregard the statement that he  
10 made concerning how everybody else thinks about it.  
11 Okay. Go ahead, Mr. Wilner.

12 MR. NYHAN: That is also addressed to the  
13 witness, Your Honor?

14 THE COURT: I think he understood that.

15 THE WITNESS: Should I disregard that; is  
16 your question?

17 THE COURT: If you have a problem, you can

18 ask me, Dr. Feingold, not the attorney.

19 THE WITNESS: Yes, sir.

20 Q Dr. Feingold, don't tell us what any other  
21 doctor felt, just tell us, in general, why that  
22 article -- what effect that article had on you.

23 A Okay. Understand that the way science  
24 works is to read and think what other people say.  
25 They're not just giving opinions; they're just

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1 saying things based on what they themselves read and  
2 study and think.

3 So the way science works is, you read and  
4 think about what other people say. Now, analyze it  
5 for yourself, and I give my opinion, and I certainly  
6 agree with that. And my opinion is that the  
7 documents of which the editorial of the American  
8 Medical -- Journal of Medical Association spoke  
9 demonstrated that the U.S. public and the medical  
10 profession had been duped and that the people who  
11 spoke for the tobacco industry had not told the  
12 truth for many years and that which they said --

13 MR. NYHAN: Your Honor --

14 THE COURT: I'll sustain the objection.  
15 Mr. Wilner maybe we ought to take a recess unless  
16 there's a particular place you want to recess.

17 MR. WILNER: I will have ten more  
18 minutes -- five more minutes.

19 THE COURT: All right. I'm going to ask  
20 the jury to step back in the jury room for just a

21 minute then.

22 (Jury exits courtroom; proceedings  
23 resumed, jury absent)

24 THE COURT: Dr. Feingold, I know you have  
25 your reasons for being here and you are called as a

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1 witness to express your opinions, and you can give  
2 your opinion. But what you have done is -- and  
3 maybe not intentionally. I'm not saying you did it  
4 intentionally -- but I have rules, too, that I have  
5 to follow and apply to legal cases, okay?

6 THE WITNESS: Yes, sir.

7 THE COURT: And one of those rules is we  
8 need your opinion. And you keep telling us that  
9 everybody thinks this same way, you know. Everyone  
10 in this article, that all of this was withheld. We  
11 don't have dates; we don't have the article.

12 If you want to say that on the basis of  
13 reading that article you decided that you needed to  
14 come and testify on this issue, then I will allow  
15 that. And that's what I was attempting to convey to  
16 Mr. Wilner.

17 But if you want to say that you came here  
18 to testify because everyone who signed that article  
19 feels so strongly about it, I cannot allow that.

20 THE WITNESS: I understand.

21 THE COURT: Even it's a fact, I cannot  
22 allow it --



23 THE WITNESS: I understand.

24 THE COURT: -- because they're not here to  
25 be cross-examined as you are.

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1 THE WITNESS: I understand.

2 THE COURT: We're not trying to keep you  
3 from expressing your opinion. We're trying to keep  
4 you from, or I am, from expressing other people's  
5 opinion at the same time.

6 The fact that everything you learned from  
7 today back colors your opinion is no problem, okay?  
8 All right. So if you bring them back in, please.

9 (Jury enters courtroom; proceedings  
10 resumed, jury present)

11 THE COURT: All right, Mr. Wilner.

12 MR. WILNER: Thank you.

13 Q Dr. Feingold, don't tell us what the  
14 documents say, and don't tell us your motivation for  
15 being here. But just tell -- tell us in general,  
16 did that article have an effect on you.

17 A Yes.

18 Q And did that lead to your doing further  
19 study about cigarette medicine, including  
20 nonpublished or material from the cigarette  
21 industry?

22 A Exactly. I promptly obtained documents of  
23 which the editorials spoke.

24 Q And did you obtain sets of documents  
25 through -- well, through different means?

1           A     Yes, multiple different means.

2           Q     Don't tell us what the documents say.

3     Just tell us, in general, how you went about  
4     collecting these.

5           A     Well, the first set was easy, because the  
6     set of documents that's discussed in this issue of  
7     the Journal of American Medical Association was  
8     available on CD rom. So there was a disk, a CD rom  
9     disk that I obtained shortly after -- I don't recall  
10    exactly -- but shortly after this was published, and  
11    I began to read some of the articles that were  
12    mentioned.

13                   Subsequently, there were texts, things  
14    that were written by other people that identified  
15    some of the documents on that CD rom, because there  
16    are many, many documents, and it's hard to find  
17    individual ones.

18                   So some people started to publish work  
19    about these documents, and I went and I read them  
20    for myself. Beyond that, evolved -- there's been an  
21    evolution since this. This is back in 1995 when  
22    there was a text -- there was a text published in  
23    1996.

24                   And subsequent to that, really, very much  
25    on the Internet. There was a huge growth of --

1 source of documents and, furthermore, when some  
2 legal actions were initiated in the United States,  
3 specifically some state cases against the tobacco  
4 industry, the Attorneys General started to put  
5 documents that they had received on the Internet  
6 available to whoever wanted to read them. So I  
7 began to obtain them that way.

8 Q And did you do anything special with your  
9 computer or your home computer or office computer so  
10 you could do this kind of work?

11 A Of course I had to down load a variety of  
12 readers. These are different devices used to look  
13 at some of these documents. I had to search the  
14 different Internet sites. I had to find them, and  
15 then I had to study these documents.

16 And beyond this, I should also say that I  
17 received documents, actually paper copies, from many  
18 different sources. I received them from your  
19 office, I received them from the State of Florida --  
20 attorneys representing the State of Florida in their  
21 action against the tobacco industry. I obtained  
22 them from the State of Mississippi, attorneys for  
23 the State of Mississippi. I have obtained them from  
24 other attorneys, as well.

25 Q And do you have -- have you, in addition,

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1 gone back and gone further into the published

2 literature as a result of what you found in the  
3 unpublished documents?

4 A Well, I was already familiar in the  
5 mid-1990s with some of the medical literature, very  
6 familiar with some of the old medical literature.  
7 But this whole process prompted me to go all the way  
8 back and start from the beginning and reevaluate  
9 what was available, for example, 1950s and 1960s and  
10 so on, all the way up to the present time, because  
11 there are things that I learned from the previously  
12 received documents that I didn't know, that I'd  
13 never known.

14 Q Well, did you actually go back then to the  
15 library and work and try to find out, for instance,  
16 when doctors or scientists first discovered that  
17 cigarettes could cause disease?

18 A Yes, this is --

19 Q Don't tell us what the answer is.

20 A No, no, no. That's for later.

21 Q And is that part of -- did that become  
22 part of the, to use a modern term, the database that  
23 you base your opinions on?

24 A Yes. The result was I went back to the  
25 very earliest articles. Some of them were discussed

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1 in various documents. I went back to these earliest  
2 articles, obtained them. Some of them are hard to  
3 get because they're in very old medical journals.

4                   And using various resources, I collected,  
5   made a collection of many, many journal articles  
6   that had been published in the medical literature  
7   and texts and so on, and I study those going from --  
8   well, some are in the '30s, but mostly from 1941 up  
9   until the present time.

10           Q     And have you been asked to testify in this  
11   trial on that question of when doctors proved or  
12   knew at different times, years, and when that  
13   knowledge was available?

14           A     Yes.

15           Q     And have you also been asked to look  
16   through and study, as a scientist and a doctor, the  
17   medical records and history of Mr. Maddox to see  
18   what caused him to die?

19           A     What happened to him?

20           Q     Yes.

21           A     Yes.

22           Q     And were you asked specifically to  
23   determine whether or not cigarettes caused his  
24   death?

25           A     I was asked to do that, yes.

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1           Q     And were you also asked to look at both  
2   published literature and internal documents to  
3   determine whether the American Tobacco Company had  
4   sufficient knowledge at certain years to issue  
5   warning to its customers?

6           A     I was asked to do that, yes, and I did.

7 Q And is that true for Brown & Williamson,  
8 too?

9 A Correct.

10 Q Were you also asked to determine whether  
11 or not American Tobacco and Brown & Williamson  
12 entered into any sort of agreement between  
13 themselves and with other parts of the industry to  
14 do any purposes that the plaintiff charges are  
15 improper?

16 A Yes, I was asked to do that. To determine  
17 from a medical point of view --

18 MR. NYHAN: Objection, Your Honor; no  
19 foundation.

20 MR. WILNER: Right. We're not --

21 Q I'm not going to ask you what your answer  
22 is. I just asked you if you were asked to do that.

23 A Okay. Yes, I was asked to do that, yes.

24 Q And have you testified in previous cases  
25 brought by injured parties against the cigarette

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1 industry --

2 MR. NYHAN: Objection; irrelevant.

3 MR. WILNER: We'll withdraw it, okay.

4 Q Were you asked by the Maddox family to  
5 come up here and discuss those issues, among others,  
6 with this jury?

7 A Yes, sir.

8 Q And do you intend to charge the Maddox

9 family for your time?

10 A No, I do not.

11 Q And are you prepared to stay until  
12 tomorrow to discuss these issues with the jury?

13 A I am prepared, and I think it's my duty to  
14 stay as long as I need to.

15 MR. NYHAN: Objection, Your Honor, on the  
16 ground previously stated.

17 THE COURT: Okay. I'll sustain the  
18 objection.

19 Q Are you prepared -- regardless of whether  
20 it's your duty, are you prepared to stay here until  
21 tomorrow?

22 A Yes, I'm prepared to stay here until  
23 tomorrow or whenever.

24 MR. WILNER: Your Honor, it's a good time  
25 now if we might take a recess.

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1 (Side-bar, Court and counsel)

2 THE COURT: Ladies and gentlemen, we're  
3 obviously going to break for the evening at this  
4 point and ask that you be back in the jury room at  
5 9:00 tomorrow morning.

6 Please do not discuss the case among  
7 yourselves or with anyone else. And we should be  
8 able to start right at 9:00. Tomorrow is the first  
9 day I don't have hearings set before the trial. So  
10 we'll be in recess, as far as the jury is concerned,  
11 until 9:00 tomorrow morning.

12                   (Jury recessed until 9:00 a.m.;

13   proceedings resume, jury absent)

14                   MR. WILNER: Your Honor, we want to submit

15   a -- that is an order from the State of Minnesota

16   case on the issue of privilege, and yours is coming.

17                   MR. NYHAN: Can I have a copy?

18                   MS. HARTLEY: As soon as we get to the

19   office.

20                   MR. NYHAN: It's coming here now?

21                   MR. WILNER: We're not going to argue it

22   now.

23                   THE COURT: Let me ask you this. Do we

24   need to meet earlier than 9:00 to argue this?

25                   MR. NYHAN: Your Honor, we have urged

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1   plaintiffs to let us know what privileged documents

2   they're using with each witness. Now, apparently,

3   there are several binders that are coming up. This

4   constantly gets postponed and rolled --

5                   MS. HARTLEY: I did this last night.

6                   MR. NYHAN: -- and we want the Court to be

7   aware of our objections to be put in this prejudiced

8   situation where they're already into this issue.

9                   THE COURT: Let me ask Mr. Wilner. Do you

10   expect to use any of the privileged documents with

11   Dr. Feingold tomorrow?

12                   MR. WILNER: Well, there are no privileged

13   documents; there are claims of privilege. And, yes,



14 we will eventually get to them.

15 THE COURT: When I say "privileged," the  
16 alleged privileged documents?

17 MR. WILNER: Alleged privileged. Yes,  
18 possibly. Not necessarily, but possibly, depending  
19 on how fast we're going.

20 THE COURT: Well, let me say this. I  
21 don't want to recess to have an hour argument on  
22 it. I'd rather start at 8:00 and argue from 8:00 to  
23 9:00 and --

24 MR. WILNER: Here's the problem, Your  
25 Honor -- and I hate to interrupt. I can't -- I

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1 think we will spend endless time trying to establish  
2 the context of the documents. I would prefer to  
3 have the witness establish what I -- if necessary,  
4 predicate.

5 Because part of my -- on a few documents,  
6 and I may not even use those. See that's why. We  
7 could have long hearings and not even use those  
8 documents.

9 THE COURT: I don't have a problem with  
10 not having long hearings. I have a problem with  
11 having long hearings between 10:00 and 11:00 or 2:00  
12 to 3:00 in the afternoon, and that's what I'm  
13 talking about.

14 MR. WILNER: Here's the point. We --  
15 there are several of the claimed privileged  
16 documents which the issue is only whether they are

17    facially privileged.  In other words, there's not a  
18    crime fraud.  We don't claim the necessity for the  
19    crime fraud exception.

20               We think they're just not authored by  
21    attorneys, they don't go to attorneys, they're not  
22    about legal things.  So they are fairly simple.  
23    There may be a few.  And that is what -- it's kind  
24    of hard to tell because of the timing, but it may be  
25    that we would reach some that we say, We accept that

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1    they're from attorneys to attorneys, but they're  
2    part of a crime fraud.

3               THE COURT:  Maybe we can do it during  
4    lunch tomorrow.

5               MR. WILNER:  Maybe so.  And the reason I'm  
6    continuing to speak is in order for me to lay the  
7    predicate of the crime fraud, I can't just go in and  
8    start talking to Your Honor and say, Well, here's  
9    why I think there was a fraud; and they'll say,  
10   Well, no, I don't think there was a fraud.  And I  
11   don't know where we'd get.

12              I think that I have to, to protect the  
13    record, lay out why this -- if that exception is  
14    necessary -- and I think it's only a very few  
15    documents.  The rest of them are either unprivileged  
16    or we think we can dispose of them on issues on  
17    their face.  But for this, I think I have to put  
18    evidence on, and I don't think I can do it just by

19 talking. That's the problem.

20 THE COURT: Maybe I don't understand.

21 Because what I was under the impression of was that

22 there were many documents that a paralegal named

23 Williams -- I forget his first name, unusual first

24 name.

25 MR. WILNER: Merrill Williams.

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1 THE COURT: Merrill Williams, right. And

2 I guess, put this on the record, because I had seen

3 a Frontline article about the Mississippi case and

4 the lawyers there and Dick Scruggs and so forth.

5 MR. WILNER: There are three out of that

6 whole set that are claimed privileged.

7 MS. HARTLEY: That have already been

8 entered in evidence.

9 THE COURT: So I don't know if I have the

10 accurate information. That's why I'm talking to

11 both of you on the record. But apparently, somehow

12 they got on the Internet from a professor in

13 California and have become, at least -- not public

14 record -- at least accessible to the public.

15 MR. WILNER: Right.

16 THE COURT: So there's a question about

17 whether you can use them if you came by them

18 legally, even if someone else didn't. And, also,

19 there is a question about whether or not they were

20 actually introduced in Minnesota.

21 And I know that that doesn't mean if you

22 had a privilege there, you didn't waive it. So I  
23 don't mean to imply that.  
24 But what I am talking about, these are  
25 general questions, are they not?

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1 MR. WILNER: Not really, because --

2 MR. NYHAN: We disagree with that. We  
3 have been asking for a hearing on the privilege  
4 issue since the first day we saw you. We haven't  
5 had it yet, and we think we should all get in at  
6 8:00 and talk about what's really at issue.

7 We have other objections to the documents  
8 that they still want to offer that haven't been  
9 resolved yet. So we think we need to do that at  
10 8:00 tomorrow morning so as not to waste the jury's  
11 time.

12 MR. WILNER: We will go anywhere, but I  
13 need -- I intend to lay a predicate for any  
14 document. I'll be happy to go in at 8:00 and start  
15 talking about documents, but I don't think that that  
16 is going to be enough. On some -- I think that  
17 these documents, the very same ones, have already  
18 been -- we've already been through this in the  
19 Carter case with Judge Davis.

20 We laid the predicate, we offered -- if  
21 we're talking about the Merrill Williams documents,  
22 we offered our package of documents. The same  
23 objections were made, they were ruled on; that

24 matter is now pending in the district court of  
25 appeal on the defendant's appeal.

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1 THE COURT: Well --

2 MR. WILNER: All that stolen document  
3 stuff.

4 THE COURT: The Minnesota documents are  
5 different from Merrill Williams?

6 MR. WILNER: Yes. What I mean -- of  
7 course some overlap. But let's first -- if I could  
8 take three minutes, I could clarify this.

9 THE COURT: I'm here.

10 MR. WILNER: Okay. The first set that he  
11 talked about -- let's call those the Merrill  
12 Williams documents. Those were the subject of the  
13 defendants' objections that they were stolen. They  
14 were the paralegal who took them and sent them to  
15 the University of California.

16 THE COURT: Well, I didn't think that they  
17 were the same as the Minnesota documents because of  
18 what was said on that Frontline program. Obviously  
19 that, no --

20 MR. WILNER: I didn't see the Frontline.

21 THE COURT: -- that they had access to the  
22 documents and that helped them when the professor  
23 put them on the Internet.

24 MR. WILNER: All right. So those were  
25 around 1994, 1995. They were the subject of the

1 editorial. Those have already been ruled on as far  
2 as the general issues in this county and in this  
3 state.

4 Judge Davis had the same kind of a hearing  
5 on are they -- is there some global defect in them  
6 and, specifically, on the -- there were three  
7 documents or two documents that were claimed  
8 attorney/client privilege, and those were ruled on.

9 THE COURT: Mr. Wilner, you can argue  
10 that.

11 MR. WILNER: I understand, but --

12 MR. NYHAN: Let's do it tomorrow at 8:00.

13 THE COURT: But what I'm talking about is  
14 giving them a hearing, not necessarily giving them  
15 an order.

16 MR. WILNER: I understand. So the next --  
17 there are other sets of documents, which we refer to  
18 as Minnesota documents. Now those are not  
19 necessarily the same. That's fine. I'm happy to do  
20 it. We can come in at 8:00, and we'll lay all that  
21 out.

22 THE COURT: Let me ask you a question. Do  
23 you have any documents from the Minnesota documents  
24 that did not go into evidence in Minnesota?

25 MR. WILNER: Certainly, some.

1 THE COURT: Okay. So you have some that  
2 have not been ruled on by any court --

3 MR. WILNER: Correct.

4 THE COURT: -- prior to --

5 MR. WILNER: I think that's probably  
6 right, although I know the Minnesota judge --

7 THE COURT: What I'm saying is that's a  
8 different category. He made them produce them all.  
9 I understand that.

10 MR. WILNER: He made them produce them  
11 overruling their privilege claims, although they  
12 weren't --

13 MS. TERRY: Under very different  
14 circumstances.

15 MR. WILNER: -- offered in evidence, they  
16 were produced and the privilege claims were  
17 overruled by that order.

18 MR. NYHAN: And some of those -- the  
19 grounds for some of those courts' decisions were in  
20 a position of sanctions, not necessarily based on  
21 the merits.

22 So there was an awful lot going on in  
23 Minnesota. And for what reason, Judge, we don't  
24 think you can do it on the fly, and we don't want to  
25 proceed to have these documents argued while the

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1 witness is on the stand, he's trying to get them in  
2 and the jury's waiting.

3 THE COURT: Let me ask you if you can do  
4 this. Can you identify those that you might use  
5 tomorrow?

6 MR. WILNER: Yeah.

7 THE COURT: Not now or -- I don't mean  
8 right this minute.

9 MR. WILNER: Within an hour or two.

10 THE COURT: Okay. And we could meet at  
11 8:30 in my office --

12 MR. WILNER: Okay.

13 THE COURT: -- and discuss overall  
14 privilege and whatever.

15 MR. WILNER: Okay.

16 MR. NYHAN: All right.

17 THE COURT: And I will try -- I don't know  
18 if I'm going to be able to read even this whole  
19 order.

20 MR. NYHAN: Can I see what we have so I  
21 can see what we need to address?

22 MR. WILNER: It's the Minnesota order.

23 MR. WILNER: This is being sent to your  
24 office. I just didn't have an extra copy.

25 MR. NYHAN: We were told that the video

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1 was sent, too. That's the only reason I asked. Let  
2 me just make a note of what we have. Do you have  
3 this, Jackie?

4 MS. TERRY: I got it all.



5 MR. NYHAN: The problem is we get stuff  
6 after it's argued --  
7 MR. WILNER: Counsel, I won't get into  
8 that with you, sir.  
9 MR. NYHAN: Do you mind if I take a moment  
10 to see what we have?  
11 THE COURT: Let's go off the record.  
12 (The trial was recessed until 8:30 a.m.,  
13 May 22, 1998)

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1 IN THE CIRCUIT COURT, FOURTH  
2 JUDICIAL CIRCUIT, IN AND FOR  
DUVAL COUNTY, FLORIDA

3 CASE NO.: 97-03522-CA  
4 DIVISION: CV-H

5

6 ANGELA B. WIDDICK, as Personal  
Representative of the Estate of  
7 ROLAND E. MADDOX, deceased,

8 Plaintiff,

9 vs.

10 BROWN & WILLIAMSON TOBACCO  
CORPORATION, a foreign corporation;  
11 LIGGETT GROUP, INC., a foreign  
corporation; and WINN-DIXIE STORES,  
12 INC., a Florida corporation,  
13 Defendants.

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14

15

16 PROCEEDINGS held before The Honorable  
17 Charles O. Mitchell, Jr., at the Duval County  
18 Courthouse, 330 East Bay Street, Jacksonville,  
19 Florida, on Friday, May 22, 1998

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22 - - -

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1 P R O C E E D I N G S

2 Friday, May 22, 1998 8:30 a.m.

3 - - -

4 (Proceedings in chambers with the  
5 following attorneys present: Mr. Wilner, Mr.  
6 Matthews,  
7 Ms. Hartley, Mr. Jarmel, Ms. Terry, Mr. Nyhan,  
8 Mr. Riley, and Mr. Browning.)

9 THE COURT: Okay. I don't know why we're  
10 here for sure. Either to talk about the privileged  
11 documents or talk about your motion to continue the

12 hearing until Monday on the privileged documents.

13 MR. JARMEL: Yes, Judge. We moved to  
14 preclude the use or any reference today of any of  
15 the privileged documents that plaintiffs intend to  
16 offer through Dr. Feingold, to set a hearing for  
17 Monday on this issue and to require plaintiffs to  
18 identify each and every privileged document they  
19 intend to introduce through Dr. Feingold today so we  
20 have an opportunity to respond to and prepare to  
21 those documents.

22 As you know, we had a representation from  
23 plaintiff's counsel yesterday at 5:30 that in an  
24 hour we would receive an identification of the  
25 privileged documents they intend to use today. We

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1 didn't receive anything at 6:30 or 7:30 or 8:30. We  
2 kept calling, no one answered our calls, no one  
3 answered our fax. At 8:30 we put in a call to Your  
4 Honor and left a voice mail.

5 THE COURT: I got.

6 MR. JARMEL: At 9:30 I received a call  
7 from Ms. Hartley indicating that they intend to  
8 introduce 299 documents today, of which 49 are  
9 privileged. None of the 138 documents that had been  
10 identified the night before were identified as  
11 documents for today. Each night we are shooting at  
12 a moving target, one which vanishes the next day  
13 when we show up for court, requiring us to spend  
14 most of the night trying to prepare. And this has

15    become very problematic.

16                   It's a violation of the representations,  
17    Your Honor, of yesterday.  It's a gross violation of  
18    the 24-hour rule.  There's no way we can prepare  
19    like this.  Now we're told here at 8:30 in the  
20    morning with the jury to come in at nine that  
21    plaintiff wants a selection of 5 of the 49 documents  
22    that they listed last night to be introduced this  
23    morning.

24                   This is what we've been talking about.  
25    This is on the fly.  I can't respond like this,

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1    Judge.  And I expect plaintiffs to argue to Your  
2    Honor that these documents have been argued before  
3    by us and that they've been admitted before.

4                   THE COURT:  Well, I understand that, that  
5    with rare -- well, maybe with no exception, but  
6    perhaps with rare exception there are no new  
7    documents to be introduced at this trial that  
8    haven't been introduced somewhere, like in Minnesota  
9    or in other places.

10                   MR. JARMEL:  But there are a great many  
11    documents that have been not been adjudicated  
12    nonprivileged.

13                   THE COURT:  And I understand that all of  
14    the documents, or I'm assuming that none of the  
15    documents have finally run their course in the  
16    appellate court, so....

17 MR. JARMEL: It's not even that, Judge.  
18 Some of these have not even been reviewed by trial  
19 court as being nonprivileged. Now, there were some  
20 blanket orders. I'm not sure that those refer to  
21 the five documents that they'd like to offer this  
22 morning, but obviously it's our position the fact  
23 that a couple of other courts have let in certain  
24 documents cannot determine this court's need for an  
25 independent assessment.

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1 In fact, the main document plaintiffs will  
2 probably offer this morning, Yeaman, is the basis  
3 for our seeking appeal as very reversible error. So  
4 we strongly urge the Court to make plaintiff  
5 identify what documents they intend to use through  
6 Dr. Feingold. If there are any that haven't been  
7 identified as of last night at 9:30, and to set  
8 hearing for Monday so we can have the time to  
9 properly respond to this -- we need time to -- Your  
10 Honor, needs time to be able to read these  
11 documents. We need time to prepare and respond to  
12 these documents, and we need time to make a record  
13 on these documents, Judge. And it's really not  
14 fair, I heard Mr. Wilner in the transcript -- I read  
15 the transcript. He said that he needs a witness on  
16 the stand to make a predicate for the admission of  
17 these documents. That's simply not true. That's a  
18 ruse, a ruse to do it on the fly.

19 If he wants Dr. Feingold to lay a

20 predicate, he can put in an affidavit for Monday's  
21 hearing. He can bring Dr. Feingold and have a  
22 minihearing on Monday. I have no objection to that,  
23 but what's going on here is the rolling dump,  
24 keeping us in the dark, keeping us up to 3:00 in the  
25 morning every night, and then coming in and saying,

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1 okay, here are the five documents out of the 50 we  
2 want to use. And you're not entitled to anything  
3 more than 15 minutes to respond.

4 It's a violation of the 24-hour rule.  
5 It's violation of the law and process required for  
6 privilege.

7 MR. WILNER: Well, Your Honor, I'm not  
8 going to throw dirt, although I heard some dirt come  
9 my way, but I'm going to restrain myself, because I  
10 think that degenerating this into a fight between  
11 lawyers is not a good idea at this time.

12 But let me just say that somebody's heart  
13 is not pure about this. And we think our heart is,  
14 but that's all I'm going to go into because fussing  
15 among lawyers does not solve any of the problems of  
16 trial, although I think I'm being fussed at.

17 We have identified these documents from  
18 the start. Last night we sent over what we intend  
19 to use -- or rather the night before. And last  
20 night we sent the same list. There wasn't any  
21 difference.

22 I don't know what all this talk is about.  
23 We've been here now, this is the third time. We're  
24 waiting. We can make some progress. I'm ready to  
25 argue.

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1 Let me give you another example. The  
2 parade of horrors about how many documents there  
3 are. There is really one ruling and that is whether  
4 BAT, the British company and Brown & Williamson, are  
5 the same entity. If they are, then other -- then  
6 they may have some colorable claim on some of these  
7 documents. If they're not, then when the lawyer  
8 from Brown & Williamson sends it to BAT, if that's  
9 not the same company, and so forth, there are most  
10 -- there are a group of documents probably of the  
11 30 or so that he talks about, they're all the same.  
12 They're just correspondence between these two  
13 people.

14 So, I mean -- now, I have one other thing  
15 to say. These -- the documents that we have in  
16 front of us know which counsel refers to, the Yeaman  
17 memorandum of July 17, 1963, which is tab 18 of the  
18 Brown & Williamson nicotine volume, which we haven't  
19 offered yet because of these claims of privilege, we  
20 had this argument exactly like this in front of  
21 Judge Davis in the Carter case almost two years ago.

22 It strains my credibility, it strains  
23 counsel's credibility to think that he cannot be  
24 ready to make the same argument or even an improved

25 argument, if he has one, that he made in Carter,

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1 that he made to the First District Court of Appeal,  
2 that they made to the Minnesota court, that they  
3 made in the Karbiwnyk case and lost, that they made  
4 in the Florida State case.

5 I mean, they've made the argument 100  
6 times over. They know exactly what document this  
7 is. So this is the only document that they objected  
8 to on privilege in Carter. So, I mean, and the fact  
9 that there are some other cables that go between  
10 these same people rise and fall on the same claim.  
11 I mean, it's just -- this is just too much.

12 THE COURT: Well, I understand that you  
13 are going to be too inclusive when you give them a  
14 list of documents.

15 MR. WILNER: Yes.

16 THE COURT: So that if it turns out you  
17 need one, it will be on the list.

18 MR. WILNER: True.

19 THE COURT: But I also think that maybe --  
20 I think you ought to do a better job of telling them  
21 certain documents that you're definitely going to  
22 use.

23 MR. WILNER: We did.

24 THE COURT: Well, I mean earlier than,  
25 let's say, the night before last.

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1 MR. WILNER: We did.

2 THE COURT: I'm talking about five this  
3 morning.

4 MR. JARMEL: Can I say something? There  
5 was something I have to correct. Mr. Wilner just  
6 represented to Your Honor that the documents that  
7 were offered last night were the same documents that  
8 were offered the night before. We checked that very  
9 carefully, and overwhelmingly the documents are  
10 different. That's not the case.

11 MS. HARTLEY: Your Honor, this was what  
12 was given to me two nights ago. If you flip through  
13 the pages, those are our books. Jackie Terry and I  
14 had agreed that this is how they would identify the  
15 privilege. The ones are circled or crossed out, we  
16 withdrew; so there was nothing in that book. Then  
17 if you look in the next book, there was one  
18 document. And if you look at the next book, there's  
19 only one in ATC Can, none in ATC Nic, and those that  
20 we've crossed out. That was something that was  
21 given to them the night before.

22 I don't think that you can say that this  
23 amount of documents that they're claiming privilege  
24 is unreasonable. This was given to them two nights  
25 ago. And we said we would introduce these books.

1 And last night I told them that we would start  
2 arguing, and I thought the only thing we could do  
3 this morning was Brown & Williamson nicotine which  
4 were five documents.

5 THE COURT: Well, I guess what I don't  
6 understand -- I hear both of you, and I think I  
7 understand what you're saying; but I don't  
8 understand why there aren't certain documents that I  
9 could have heard the arguments on two weeks ago or  
10 at least last week because you know that you want to  
11 use the Yeaman document. They know that they don't  
12 want you to use it. I mean, that's what I'm talking  
13 about.

14 I mean, I can understand that we shouldn't  
15 go down 150 documents, Mr. Wilner, when you may end  
16 up using five of them or ten.

17 MR. WILNER: Sure.

18 THE COURT: But there are what you would  
19 consider critical five or ten documents then. And  
20 if we argued a couple of documents that you never  
21 put in, so what? But, I mean, I wouldn't want to  
22 argue 90 documents you never put in.

23 MR. WILNER: I agree. We've been ready,  
24 Your Honor. We stand -- we pledge to the Court  
25 we've been ready any time to argue whatever

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1 documents we intend to offer. I remember sitting  
2 here and, again, I think that fussing at counsel is

3 a waste of time but --

4 THE COURT: I don't want to get.

5 MR. JARMEL: But, Judge, I asked before  
6 this trial started to set up a hearing to talk about  
7 what documents --

8 THE COURT: I think it was agreed, and I  
9 signed an order saying -- I believe I signed an  
10 order. If not, it's on the record, a verbal order  
11 saying 24 hours. You wanted 48.

12 MR. JARMEL: At 9:30 last night was  
13 contrary to the representation of counsel. And it  
14 was contrary to the 24-hour rule. And under those  
15 two principles, if the 24-hour rule is violated here  
16 in not giving us an opportunity to respond to our  
17 privilege claims, then...

18 MR. WILNER: Your Honor, if he's worried  
19 about 24 hours, the reason that we said let's argue  
20 the Yeaman memo was because that argument had been  
21 done for two years. If he doesn't want to argue  
22 Yeaman, let's go back in time to 24 hours ago, 48  
23 hours ago with exactly the few documents that we  
24 suggested, and we'll -- and we're ready to go. We  
25 don't have to argue the Yeaman memo today.

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1 That's not a problem. If he isn't ready,  
2 that's okay. I have other documents that we told  
3 him 48 hours ago we were going to argue privilege  
4 on, and we're ready to argue it.

5 MR. JARMEL: You just heard the shuttle

6 game, Judge. They told you -- Mr. Wilner told you  
7 five minutes ago that they were the same documents.  
8 He just conceded that we're talking about two  
9 different sets of documents. But last night -- I  
10 don't know. I mean, each day, Judge, the list  
11 changes. Each night I get a different list at 9:30  
12 at night.

13 MR. WILNER: That's not true. It was 48  
14 hours ago. That's not true. That's baloney.

15 THE COURT: What, the Yeaman documents?

16 MR. WILNER: Yes.

17 MS. HARTLEY: Yes, here they are. This  
18 was the letter from 48 hours ago. That's not a  
19 different set. That's the exact same documents.

20 MR. WILNER: I can't believe it.

21 THE COURT: It looks like it on the 20th,  
22 if that's correct.

23 MS. HARTLEY: It's the exact same thing we  
24 gave them again last night.

25 THE COURT: Well, let me say this. I

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1 realize that one of the major problems in this case  
2 is the amount of documents. And I'm well aware that  
3 you were given a list of 400 documents the first day  
4 or something. And I realize that coordinating it is  
5 a tremendous job for both sides.

6 So I realize that Ms. Hartley has a tough  
7 job trying to pull those documents physically and

8 coordinate with Mr. Wilner and Mr. Matthews which  
9 documents the three of them are going to use the  
10 next day. I realize that even though -- I am not  
11 impressed with the fact that these are your  
12 documents and you've had them for years so you've  
13 had, you know, the last ten years to leisurely study  
14 them.

15 MR. JARMEL: I certainly haven't had ten  
16 years. I've had two nights.

17 THE COURT: Obviously you haven't,  
18 Mr. Jarmel. And I don't mean to imply that, so I'm  
19 not impressed with that argument that they're your  
20 documents so you ought to know all about them  
21 anyway.

22 I don't think it's unreasonable to give  
23 you the 24 hours notice. But, like I say, I mean,  
24 you know, and you-all have had an unusual amount of  
25 cooperation in order to get to this point. I'm

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1 talking about between you and I don't want to see it  
2 go down the drain at this point; but the remedy that  
3 I normally use is not to exclude the documents but  
4 to recess the trial long enough to have the argument  
5 on them and for you to be prepared.

6 And I know that none of us wants that, but  
7 if it becomes -- it it gets to the point that that's  
8 the only way you can represent your client properly  
9 in your mind, then I'll do that.

10 MR. JARMEL: Judge, I'm not prepared to

11 respond this morning or even this afternoon to the  
12 49 documents that they've listed. I would have had  
13 to stay up to 4:00 in the morning to do that. My  
14 suggestion is that we do this on Monday when the  
15 jury is not here. They tell us today what documents  
16 they intend to offer. Feingold will still be on the  
17 stand. They can still get their testimony; there's  
18 no prejudice to them. They said to Your Honor at  
19 5:30 they'd give it to us in an hour. If they had  
20 done that, and given us the real list, we'd be  
21 prepared to go forward.

22 MR. WILNER: Well, Your Honor, this is the  
23 same list. We'll go on the list we gave two nights  
24 ago if he's worried about 24 hours. We gave this to  
25 them 48 hours ago.

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1 I can't stop this trial and stop my  
2 witness because they keep saying they're not ready  
3 to argue privilege. If we have to today -- I don't  
4 know how far we'll get today. If we have to, if I  
5 get to a point where this is necessary for me to  
6 introduce, I don't see -- we're trying to protect  
7 against this, maybe we can't. So we'll say, okay, I  
8 offer this, and we'll see how much we have to  
9 argue. And if we have to argue a lot, maybe we'll  
10 have an early day and we'll send the jury home.  
11 Whatever we do.

12 THE COURT: Let's try to get as far as we

13 can. And, now, for Monday, it looks like we're  
14 going to be working Monday, which is fine. I don't  
15 have a problem with that. How long a hearing do we  
16 need? When do you want to start it?

17 And what I will need from both sides is a  
18 list of everyone who needs to get into the  
19 courthouse that day. The courtroom is going to be  
20 secured, so you won't be able to get into the  
21 courtroom. Security, in order to let anybody beyond  
22 the first floor, will need a list of the people that  
23 they can let in, then you'll have to sign in.

24 So, you know, I don't care who's on the  
25 list, but if either side, if you want them here, and

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1 maybe somebody needs to give a list of all the court  
2 reporters who might be here, you know. So what time  
3 do you all want to start? How long do you think the  
4 hearing will last?

5 MR. WILNER: You know, we think that all  
6 of these privilege claims hinge on about two  
7 rulings, so I've always said we can be done with it  
8 in 15 minutes if we can ever start. That's all I  
9 say.

10 THE COURT: Mr. Wilner, you know, I think  
11 you and I have not seen eye to eye on this subject.  
12 What I'm saying, the ruling may not take long. I'm  
13 going to give both sides the opportunity to put  
14 whatever argument they want on the record, what they  
15 want, what you want, on the record. And then I'll

16 make a ruling, but I mean --

17 MR. WILNER: You asked me, I said 15  
18 minutes.

19 MR. WILNER: Whatever they need.

20 THE COURT: That's the usual answer  
21 because you don't think they have any defense to it.

22 MR. WILNER: True.

23 THE COURT: And they think they have a  
24 defense to it.

25 MR. WILNER: Right.

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1 THE COURT: So they are going to --

2 MR. WILNER: Right.

3 THE COURT: -- probably spend a little  
4 more than 15 minutes trying to convince me.

5 MR. WILNER: Whatever they need for me.

6 THE COURT: What do you need, Mr. Jarmel?

7 MR. JARMEL: Judge, it depends on how many  
8 documents. Are we talking about --

9 MR. WILNER: It's the documents that we  
10 gave you 48 hours ago.

11 THE COURT: Let me say that this is  
12 not --

13 MR. JARMEL: This is a moving target. You  
14 identified 49 privileged documents yesterday. Are  
15 these the documents we're talking about for Monday?

16 MR. WILNER: The documents we identified  
17 48 hours ago.



18 MR. JARMEL: So it's not the documents --

19 MS. HARTLEY: They're the exact same  
20 documents.

21 MR. JARMEL: Jackie, are they the same  
22 documents?

23 MS. TERRY: Everybody stop yelling. This  
24 is what happened two nights ago because Stephanie  
25 and I had a conversation. What was identified as

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1 B & W Can, Tucker, ATC Can, ATC Pub, B & W Pub,  
2 possibly conspiracy.

3 Stephanie and I had went through a list  
4 that I had given her so we can all be on the same  
5 page. She went to B & W Nic and said, Jackie, we're  
6 going to offer in these documents, but I don't think  
7 we're going to get to B & W Nic.

8 What we're going to focus on are these  
9 four. Then last night Stephanie and I talked, and  
10 B & W Nic is on the list. So arguably it wasn't  
11 48-hour notice. We were on notice that when and if  
12 these documents do come in, these particular  
13 documents were going to be introduced, Judge.

14 Last night, and I didn't compare nor did I  
15 have the time to compare the conspiracy privileged  
16 documents, but Stephanie and I can and I will just  
17 look at my old list and see. But I don't think 49  
18 is excessive, and I will count if you want me to,  
19 Judge.

20 THE COURT: Let me say this, I will spend

21 all day Monday if we need to.

22 MR. JARMEL: If there are 49 documents,  
23 I'll take Stephanie's word for it. I don't want to  
24 get into a silly fight about this. I was told --

25 THE COURT: Mr. Jarmel, I just want an

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1 estimate. I'm not going to hold you to it. If you  
2 say two hours and it turns out to be four, I don't  
3 have a problem.

4 MR. JARMEL: I can't talk that long,  
5 Judge. They're not coming on Monday, Judge. Don't  
6 put them on the list. If there are 49 and the same  
7 sets, two hours will be fine.

8 MR. TERRY: Judge, can I just throw in --  
9 this is another caveat. Separate and apart from the  
10 privilege, which everybody is most concerned about,  
11 I have other objections that may not take so long  
12 that I would like to put on the record. And I don't  
13 know if I can work with Stephanie, or perhaps  
14 Mr. Wilner, to find out exactly what they want to  
15 introduce today; but before that happens, I'd like  
16 to at least have the opportunity to make a record of  
17 some sort about certain of the nonprivileged  
18 documents that plaintiff may or may not seek to  
19 introduce.

20 As we stand right now, I have a multitude  
21 of objections to multitude of documents. However, I  
22 don't think that Mr. Wilner is going to offer them

23 all, so we can narrow down that list, and maybe at a  
24 break or early lunch, I would have an opportunity to  
25 make that record and don't have to get in anybody's

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1 way on Monday.

2 THE COURT: Can you give them a list of  
3 what you probably will do this day?

4 MR. WILNER: It's a long today.

5 THE COURT: Again, you don't have to put  
6 all of them in.

7 MS. TERRY: Just so we're breaking up.

8 MR. MAXWELL: See, the problem I have now  
9 is I had intended to go into the nicotine, so if I'm  
10 precluded from going into that, then I have to do --  
11 I've got to reorganize my day. I don't know right  
12 now.

13 I had intended to go into this hoping we  
14 could get this heard. If we can't get it heard,  
15 I've got to go in a different direction. So it will  
16 take me a little while to get that squared away. I  
17 guess we'll put in conspiracy.

18 THE COURT: Well, if you get to the point  
19 where you no longer want to ask Dr. Feingold  
20 questions without getting into those documents, then  
21 we recess the trial early and start the hearing  
22 today.

23 MR. WILNER: I think it may come to that.

24 THE COURT: They need to know which  
25 documents you're going to start arguing with. I

1 think, you know, Saturday and Sunday will be plenty  
2 of time to put together an argument for the  
3 documents Monday if they know which documents you're  
4 talking about Monday, but if we're going to argument  
5 documents this afternoon, they definitely need to  
6 know which ones you're talking about.

7 MR. JARMEL: Is there any problem with us  
8 talking and getting specific identification of any  
9 and all documents you would argue on Monday,  
10 privileged documents?

11 MS. HARTLEY: You have it.

12 MR. JARMEL: Stephanie, we don't have to  
13 do this. Can you just talk and make sure that we  
14 understand we're all on the same page. That doesn't  
15 sound unreasonable to me.

16 MR. WILNER: There's several requests.  
17 One is that we identify privilege documents that we  
18 are going to find that we need to offer today,  
19 right?

20 THE COURT: Right.

21 MR. WILNER: Or nonprivileged documents.

22 THE COURT: Both. If you can give them a  
23 manageable list this morning and Ms. Terry has an  
24 opportunity to look it over and discuss it with  
25 Mr. Jarmel, or both of them look it over, however

1 they're going to do it, again, some of them --

2 MS. TERRY: We may have no have objections  
3 to.

4 THE COURT: Or you will have, perhaps,  
5 short objections. You know, I haven't had any  
6 problem with either side making strenuous arguments  
7 except when they thought it was important to them,  
8 if that's the right phrase.

9 But I realize there are technical  
10 objections, too, that you have that you want to  
11 preserve. But, you know, I don't have a problem  
12 with recessing for 10 or 15 minutes to do a document  
13 or two, but I don't want to do that every 15 minutes  
14 of testimony.

15 So I'd rather just recess early, have an  
16 hour or two hearing and, you know, start early. I  
17 can tell the jury we'll start at 8:00 Tuesday, you  
18 know, to get Dr. Feingold through if we have to make  
19 the time up.

20 MR. JARMEL: Judge, on the privileged  
21 documents, I can't do a ten-minute privilege. I  
22 just want to explain. So my request, again, is that  
23 no privileged documents be referred to or used  
24 today, and that we do all of them on Monday morning.

25 THE COURT: See, this is why I've been

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1 talking about a hearing. I figured that whatever I

2 do with the privileged documents, that you're going  
3 to want to put 45 minutes or an hour's worth of  
4 discussion on the record before I rule. And however  
5 I rule, and I don't know how I'm going to rule at  
6 this point, but that's what I've been trying to get  
7 to. And I do not want to do that 45 minutes or an  
8 hour while the jury is sitting there.

9 Now, I don't mind doing it at the end of  
10 the day if we can do it that way or, that won't help  
11 us too much other than it would be dead time  
12 otherwise if you can't go any further with  
13 Dr. Feingold.

14 MR. WILNER: Well, we may reach that point  
15 where we just have to stop.

16 THE COURT: Just let me know, and we'll do  
17 that and start earlier Monday -- I mean Tuesday. I  
18 don't have a problem being here all day Monday  
19 except I have a 13 year old who would be sitting  
20 here probably, too. And so let's go off the record.

21 (Discussion off record)

22 (Proceedings in chambers concluded at  
23 9:00 a.m., and change of reporter)

24  
25

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1 P R O C E E D I N G S

2 May 22, 1998 9:05 a.m.

3 THE BAILIFF: This court is back in

4 session. Please be seated.

5 THE COURT: Good morning.

6 MR. NYHAN: Your Honor, we have one matter  
7 to take up at the side bar.

8 THE COURT: Do we need the reporter?

9 MR. NYHAN: Yes.

10 (Side-bar conference held outside the  
11 hearing of the jury)

12 MR. RILEY: Judge, we understand from  
13 talking with Mr. Wilner this morning that he intends  
14 to get into the issue of whether Mr. Maddox had COPD  
15 related to cigarette smoking. We object to that on  
16 the grounds that in connection with our summary  
17 judgment motion that the plaintiffs expressly stated  
18 that they were not seeking damages for COPD or  
19 emphysema in the case.

20 Mr. Maddox was diagnosed with COPD in  
21 1991. Any claim for COPD would be time barred on  
22 that basis. And in fact Mrs. Widdick in her  
23 deposition testified that Mr. Maddox was aware of  
24 that diagnosis and tried to quit at the time, so he  
25 certainly had knowledge and notice of the claim.

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1 And, therefore, we object to them getting into COPD  
2 or emphysema. It's irrelevant. They have taken the  
3 position they are not seeking damages for that in  
4 the case, and that is the basis for our objection to  
5 that testimony, Your Honor.

6 MR. WILNER: Your Honor, in 1994 as part

7 of his medical records, he goes in and is diagnosed  
8 with emphysema. The issue or the relevance of any  
9 disease he has is -- well, let me say it more  
10 clearly. Any cigarette-related change in his lung  
11 is, and this is a matter for expert testimony, is a  
12 contributing factor to the diagno- -- to the causa-  
13 -- to the opinion on causation --

14 THE COURT: I understand what you are  
15 saying.

16 MR. WILNER: I'm sorry. I wasn't very  
17 clear, because I'm a little foggy this morning.

18 THE COURT: It's interrelated.

19 MR. WILNER: It's related because he can  
20 say, well, look, here's this damage, and that makes  
21 it much more likely that the cancer was caused by  
22 smoking or something like that, but it's experts.  
23 We're not seeking --

24 THE COURT: I think probably the best way  
25 to handle it is to let it go in over your objection

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1 with the understanding that I will give the jury a  
2 special instruction that they are -- that they  
3 cannot consider any of the emphysema damage. I  
4 don't know how we will --

5 MR. WILNER: It's wrongful death anyway,  
6 Your Honor.

7 THE COURT: But, I mean, I would not be  
8 adverse to giving a special instruction, because I



9 don't know -- I'm not sure if I know the medical  
10 connection between emphysema and lung cancer or if  
11 there is one, okay. Now, I understand what you  
12 said, Mr. Riley, but I don't know if it's --

13 MR. RILEY: Well, I guess, if this comes  
14 in, it's got to be for a very limited purpose.

15 THE COURT: I would agree, and -- but I  
16 mean, I don't think we can ignore the medical  
17 records that say when we start out being concerned  
18 about lung cancer he had a history of emphysema.  
19 You know, that is what I am talking about.

20 Now, if it's barred by the statute, then I  
21 don't have a problem with telling the jury that in a  
22 way that they will understand, if you want to  
23 propose an instruction on it, if you can decide that  
24 later, depending on what comes in, okay.

25 MR. RILEY: Okay.

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1 MR. NYHAN: Do I need to make any further  
2 objection this morning?

3 THE COURT: No. I mean, I think you have  
4 a standing objection to anything concerning  
5 emphysema and if you -- and I don't think you waive  
6 that by asking him about it if Mr. Wilner goes in on  
7 direct examination, okay.

8 MR. WILNER: Thank you, Your Honor.

9 (Side-bar conference concluded;  
10 proceedings resumed before the jury)

11 MR. WILNER: I just need one second.

12 THE COURT: We are waiting for Mr. Nyhan  
13 to come back anyway.  
14 Are you ready to proceed, Mr. Nyhan?  
15 MR. NYHAN: Yes, Your Honor.  
16 THE COURT: Ready, Mr. Wilner?  
17 MR. WILNER: Yes, Your Honor.  
18 THE COURT: All right bring them in,  
19 please.  
20 (Jury enters courtroom)  
21 THE COURT: Good morning, ladies and  
22 gentlemen.  
23 THE JURY: Good morning.  
24 THE COURT: All right, Mr. Wilner, you may  
25 proceed.

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1 MR. WILNER: May it please the Court.  
2 BY MR. WILNER:  
3 Q Good morning, Dr. Feingold.  
4 A Good morning, Mr. Wilner.  
5 Q Thank you for bearing with us. I don't  
6 believe we'll be here day to day. Are you able to  
7 give us your time?  
8 A Yes, sir.  
9 Q Remember yesterday I had asked you what  
10 you were asked to do in this case by way of review  
11 of Mr. Maddox's medical records and review of  
12 scientific literature and review of internal company  
13 documents. Do you remember?

14 A Yes, of course.

15 Q All right. This morning I'm going to ask  
16 you a little bit about your review of Mr. Maddox and  
17 what happened to him and why he died. Now, before I  
18 do, tell me, in your daily practice are you  
19 confronted with patients who have lung cancer?

20 A Yes. Unfortunately, that's my job. That  
21 is what I have to do.

22 Q How do you come -- how do you come to deal  
23 with, treat, or see patients with lung cancer?

24 A Patients are sent to me by other doctors.  
25 Typically the other doctors have seen them, perhaps

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1 for a routine checkup or for evaluation of some  
2 other problem, and the patient has complained of  
3 cough or coughing up of blood or shortness of breath  
4 or something like that. They get a chest x-ray, and  
5 the chest x-ray demonstrates an abnormality. So  
6 patients are sent to me to figure out what the  
7 abnormality is.

8 Q How do you go about diagnosing them?

9 A There are various ways. For one thing  
10 there are certain x-ray appearances that are typical  
11 of cancer and very strongly suggestive, not  
12 completely diagnostic or definite, but some  
13 appearances are real suspicious for cancer, almost  
14 as suspicious as looking at your face and saying  
15 it's Mr. Wilner.

16 That's one aspect. Another aspect is the

17 physical examination and the history of the  
18 patient. Knowing that the patient has a risk factor  
19 for increasing the risk of lung cancer, such as  
20 certain occupations may play a role, but the key  
21 issue is whether or not the patient has a history of  
22 cigarette smoking. So individuals who are cigarette  
23 smokers who have certain kinds of abnormalities on  
24 chest x-ray almost always have lung cancer. That's  
25 the grim job and experience of a lung specialist.

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1 Q Do you sometimes ask that there be some  
2 surgery done to sample the tissue?

3 A Sure. What happens is when the lung  
4 specialist, like myself, has a high degree of  
5 suspicion that the patient has lung cancer, because  
6 they are a cigarette smoker and fall into a group  
7 and have a certain clinical history and certain  
8 findings on physical examination and certain x-ray  
9 abnormalities, with all of that, then we go ahead  
10 and we do biopsies. So I, for example, do a  
11 bronchoscopy, which is a special test.

12 Q And is this something you do with your  
13 hands on the patient?

14 A Yes. It's very interesting, unless you  
15 happen to be the patient. It's a fiberoptic scope,  
16 a long scope, which is very small, that has a camera  
17 attachment at the end of it. And incredibly enough  
18 we would get this all the way up the nose and down

19 into the lungs of the patient. It is sort of an  
20 incredible journey into the inside of the body and  
21 watch this on the video screen and at the same time  
22 watch on the x-ray screen. So I'm actually looking  
23 from the outside and looking from the inside at the  
24 same time.

25 It is complicated because it's hard to

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1 know where you are. There are no signs, and you  
2 have to get to that portion of the lung which you  
3 have identified by x-ray as having the problem.

4 Q And do you try to snip a piece of tissue  
5 off so that the pathologist can look at it.

6 A That's exactly the idea. You go in there  
7 looking for the tumor. Sometimes the tumor is  
8 protruding into the tubes, into the bronchial  
9 tubes. Sometimes it is not. If it's not, then you  
10 try to suck up some of the secretions from the lung,  
11 from that area, and give it to the pathologist,  
12 which is the special doctor in the hospital with the  
13 laboratory who looks at the slides.

14 Q And then is there a diagnosis that is  
15 developed between you and the pathologist and anyone  
16 else in the hospital involved?

17 A Yes. You know, it's a common  
18 misconception that the pathologist makes the  
19 diagnosis just by looking at the slides. And, in  
20 fact, the doctor has to be involved. Certain slides  
21 have appearances that are very, very, very typical

22 of cancer just, again, like your face is Mr. Wilner.  
23 But it has to be within the context of the patient  
24 situation.  
25 If I have done a biopsy, if I have

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1 actually taken a piece out of the patient's lung, I  
2 go to the pathologist and I sit with the  
3 pathologist, and we look under a microscope. It's a  
4 special double-headed microscope, and we look at the  
5 slides. He is the one or she is the one who gives  
6 me what they think in terms of the appearance, but  
7 we look at it together.

8 So the diagnosis, the pathology diagnosis,  
9 is typically made by the pathologist with the lung  
10 specialist.

11 Q Now, if the diagnosis, based on your  
12 x-rays and your physical examination and whatever  
13 tissue is available, is bad, if it is cancer, do you  
14 have any involvement with the patient?

15 A Yes.

16 Q Just tell us generally, and we'll get into  
17 the details.

18 A Absolutely. I mean, then it becomes my  
19 job to tell the patient and the family what they  
20 have, and then I become the coordinator of the  
21 treatment. I am the one who has to decide what to  
22 do.

23 Q Okay. Now, do you keep records of

24 everything that happens in the hospital?

25 A Oh, yes. We keep very detailed records.

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1 Q Are you required to do that?

2 A We're required to and it helps in the  
3 treatment of the patient, and now with electronic  
4 means it is much easier.

5 Q You never got the opportunity to see  
6 Mr. Maddox himself?

7 A That's correct.

8 Q Did you get an opportunity to see the  
9 records, the medical records that were generated  
10 when he was treated at various hospitals around West  
11 Palm Beach?

12 A Yes. I received eventually three thick  
13 folders of medical records on Mr. Maddox.

14 Q Did you have a chance to look through all  
15 of those records and evaluate them and plenty of  
16 time to do it?

17 A Oh, yes.

18 Q And were they kept in a familiar form to  
19 you so that you recognized how they did their  
20 notations and all that sort of thing?

21 A Sure, the typical medical records; you  
22 know, doctors use jargon like every other kind of  
23 professional use special terms and language. The  
24 documents are of certain formats. It was typical.

25 Q So did you, at my request, pull out some

1 representative records that tell the story of  
2 Mr. Maddox's last days?

3 A Yes.

4 Q Can we see some of them. And if you  
5 would -- I believe I have marked the same ones, so  
6 if I haven't, let me know.

7 Can we start off with a note from the 7th  
8 of March 1994. Do you have your own set or do you  
9 need another set?

10 A I have my own set, but I remember them  
11 well. If you project them, I'll be able to comment  
12 on them. And also I have my report here.

13 Q Sure. Just tell us, just because this is  
14 the first one, tell us what this is.

15 A This is a record that pertains to a  
16 problem that the patient had in 1994, a problem that  
17 is typical of men as they get older and have  
18 difficulty urinating. It's caused by enlargement of  
19 the prostate. So I should just say that this  
20 patient, who was 64 at the time, at this time  
21 3/7/94, he was 64 years old. At that time he had up  
22 until then had very little medical trouble. He had  
23 one episode of gallbladder attack in 1972, but other  
24 than that, he was pretty well.

25 And as it says over there, "medical



1 history otherwise unremarkable," meaning there was  
2 nothing special except for this problem with his  
3 distended bladder and inability to urinate.

4 Q Does this have anything to do with cancer?

5 A No.

6 Q Why did you choose this record to -- or  
7 what does this record illustrate then?

8 A Well, it says a couple of things. It  
9 shows one of the episodes when a patient stops  
10 smoking or tried to stop smoking, it said there that  
11 he quit smoking seven months before.

12 And also, if you go on to the next page,  
13 you'll see that there was some discussion about his  
14 daughter. Apparently his daughter was there and was  
15 involved with the medical evaluation. She was  
16 complaining that her father had a smoker's cough.  
17 If you go on to the next page --

18 Q Well, let me just read that: However, the  
19 daughter says he does have a smoker's cough, and the  
20 patient says that recently a URI was going around  
21 that left him with a cough, mostly nonproductive.  
22 He's been taking Robitussin.

23 What's a URI?

24 A Upper respiratory tract infection.

25 Q Is that a doctor's term?

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1 A Yes.

2 Q So okay. And then you see the next page?

3           A     Yes.  You see that the chest x-ray  
4   impression or chest x-ray --  
5           Q     Over here (indicating)?  
6           A     Yes.  
7           Q     Yes.  
8           A     Impression of chest x-ray is normal heart  
9   size and COPD.  
10          Q     Okay.  And what is COPD?  
11          A     Chronic obstructive pulmonary disease.  
12          Q     Is that cancer?  
13          A     No.  
14          Q     What is that due to?  
15          A     That is caused by cigarette smoking.  It's  
16   a typical cigarette smoking induced disease, caused  
17   almost only by cigarette smoke.  
18          Q     And under here it says "impression."  
19          A     That's the doctor's diagnosis in patient  
20   with probable lung damage from long-time smoking.  
21          Q     Is that cancer?  
22          A     No.  
23          Q     Just briefly tell us what COPD means.  
24   We've heard the term.  
25          A     Cigarette smoking causes damage to the

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1   inner lining of the bronchial tubes and also to the  
2   small alveoli, the little sacs, the tiny little air  
3   sacs and the ends of the bronchial tubes.  
4                If the bronchial tubes themselves are

5    damaged and inflamed, they become swollen and  
6    excessively strong, excessively muscular and people  
7    have difficulty breathing. Patients produce too  
8    much mucus, they cough, they get short of breath,  
9    they can't inhale and exhale properly. Their  
10   movement of air into and out of the lungs is  
11   abnormal. That's COPD.

12            If the disease also involves actual  
13   breakdown of the little air sacs, the alveoli, that  
14   is called emphysema. Now, both diseases are lumped  
15   by most into the general term COPD, which means  
16   chronic bronchitis and emphysema.

17            Q    Let's look at the next x-ray -- I mean the  
18   next record, which is the 26th of August 1996. And  
19   tell us what is happening here.

20            A    Well, actually I should tell you a couple  
21   of things happened before that particular record.

22            Q    Okay.

23            A    I'm not sure if you have them but --

24            Q    Well, tell us first.

25            A    Okay. First of all in December 1995, the

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1    patient went for a checkup.

2            Q    And you're basing this on review of all  
3   those records?

4            A    Oh, I have all the records.

5            Q    Okay.

6            A    In December, actually it was December 8th,  
7   1995, the patient went to a clinic and went for a

8     checkup, and there was some very little notation,  
9     but the doctor said he was going to check a chest  
10    x-ray.

11               The patient seemed to be all right for  
12    about four months, but on April 10th, 1996,  
13    something very strange happened to this person, and  
14    that is that he developed a thrombophlebitis of the  
15    right inner leg. Now, a thrombophlebitis means a  
16    clot and a swelling and inflammation of a blood  
17    vessel, a vein, inside the leg.

18               Now, this happens to people without  
19    cancer. In fact, if you sit on an airplane for too  
20    long and don't move, you can get a clot in your leg,  
21    and the clot is very irritating, so you get  
22    inflammation. Sometimes pregnant women get this  
23    because of increased clotting ability during  
24    pregnancy. There are various things that cause it,  
25    but one of the bad things that causes it is cancer.

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1    So it's a kind of -- it's a peculiar secondary  
2    effect of cancer, this thrombophlebitis.

3               Q     Was it known that this was due to cancer  
4    at the time in 199- -- what, 1995?

5               A     No, it is '96 already.

6               Q     '96. Yes, April '96.

7               A     Yes. It's just a couple of months before  
8    his diagnosis. It wasn't known by the doctor, and  
9    it's not uncommon for it not to be known. It's --

10 you know, there are thousands of symptoms and  
11 possible things that go wrong with people, and the  
12 association is very often not recognized except in  
13 retrospect.

14 So here the patient came in with this  
15 peculiar thing. It's peculiar because a 64-year-old  
16 man -- or a 66 at that point, year old man, doesn't  
17 typically get that unless there is a reason.

18 Q Let me see.

19 A I think I actually pulled that record for  
20 you.

21 Q All right. Well, all right, we'll get  
22 back to it. But anyway, that was not diagnosed as  
23 cancer at that time?

24 A No.

25 Q So what led up -- what happened to

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1 Mr. Maddox that got him in to be diagnosed?

2 A Well, by June he wasn't feeling well.  
3 This was June '96, just about two years ago. He was  
4 coughing, according to the medical records. He had  
5 chest congestion. He was fatigued, felt tired all  
6 of the time. That is what the medical records say.  
7 And he was coughing up some mucus.

8 So he went to the doctor on April --  
9 excuse me, on June 5th, '96, and the doctor was  
10 worried about him and decided to send him to a lung  
11 specialist who was Dr. P. William Ludwig.

12 Typical of what happens, which is exactly

13 what happens to me all the time, the general doctor  
14 or some other specialist sees the patient and they  
15 are worried about something going on in the chest,  
16 then they send the patient to me.

17 So in this case the doctor, the patient's  
18 doctor sent the patient to Dr. Ludwig, who saw him  
19 on July 16th.

20 Q So let's look at July 16th, 1996, from  
21 Dr. Ludwig. I think this is it. I need the number.  
22 All right. And you know who Dr. Ludwig is, just...

23 A I know his name. I have never met him.

24 (Podium tips)

25 MR. WILNER: It's off balance or I'm off

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1 balance. Oh, it's on the wire. If I look like I'm  
2 going to tilt, let me know. All right, I'm sorry.

3 Q So this is a consult by Dr. Ludwig, who is  
4 also is a pulmonologist like yourself?

5 A Yes, sir.

6 Q And he sees doctor -- he sees Roland  
7 Maddox, who has had some problems. He has had a  
8 cough and he doesn't feel well?

9 A Right. You see the letter is addressed to  
10 Richard Goldberg. Richard Goldberg is the patient's  
11 doctor. He is the general doctor who saw  
12 Mr. Maddox.

13 Q And is this how it works?

14 A This is how it works. The general doctor

15 sees the patient, sends the patient to the lung  
16 specialist. The lung specialist, and lung  
17 specialist sees the patient, comes to certain  
18 conclusions and writes a letter, which is called a  
19 consultation report to the general doctor.

20 Q It says, "Thank you for the opportunity of  
21 seeing Mr. Maddox and consultation today for  
22 evaluation of his symptoms of dyspnea." What is  
23 dyspnea?

24 A Shortness of breath.

25 Q "He is a 66-year-old male with a history

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1 of long-standing cigarette smoking." That's the  
2 second sentence in Dr. Ludwig's report. Do you see  
3 that?

4 A Yes. And it's the first thought in every  
5 lung specialist's mind.

6 Q "He smoked a pack a day from age 16 to  
7 aged 66, quitting completely approximately two  
8 months ago."

9 Now, I thought in 1994 he quit?

10 A Right. But the medical records show that  
11 he quit and restarted, quit and restarted a bunch of  
12 times.

13 Q Is that typical?

14 A It is absolutely typical, yes.

15 Q "He had a long-standing history of nasal  
16 and sinus symptoms" -- I won't read the whole thing  
17 -- "...now he has a significant dyspnea, which you

18 said was shortness of breath?

19 A Right. But look down. You see, typically  
20 when he gets an upper respiratory tract infection,  
21 he has sinus congestion, shortness of breath, and  
22 then an episode of bronchitis as well. This is  
23 code. It's medical code, yes.

24 Q What does it mean?

25 A It's the -- these are the criteria for

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1 chronic bronchitis, because you see the diagnosis of  
2 chronic bronchitis, which is a cigarette-induced  
3 disease, requires various things. There are certain  
4 criteria. It requires that when people get  
5 otherwise minor respiratory tract infections, they  
6 also develop an episode of persistent bronchitis.  
7 So it is one of diagnostic features of chronic  
8 bronchitis or COPD.

9 Q All right. So then on the second page.

10 A Yes.

11 Q Dr. Ludwig says --

12 A Well, you see the impression?

13 Q The impression.

14 A Well, I should say that he examined the  
15 patient. You see the physical examination of the  
16 chest. And you are really seeing various things.  
17 He had no fever. The chest was hyperinflated.

18 Q What is that?

19 A That means that the chest is abnormally



20 large.

21 Q Is that good?

22 A No. It is bad.

23 Q Why?

24 A Because it means that the person can't  
25 exhale properly, and there is chronically more air

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1 in the lungs than are supposed to be there. We'll  
2 see that on the x-ray when I show the x-rays.

3 The only reason that that happens is  
4 because the bronchial tubes are blocked, they are  
5 constricted and inflamed and swollen. And so when  
6 the person takes a breath in, they can get the air  
7 in, but they can't get the air out. In fact, they  
8 can never get the air out.

9 Also when there is destruction of the lung  
10 tissue itself, the alveoli, the little air sacs  
11 break down. They can't off gas. They can't get the  
12 gas out, so the patient gets hyperinflated  
13 (demonstrating). And if you can imagine what it's  
14 like to breath with your lungs already full, that's  
15 what it feels like.

16 (Change of reporters, 9:30 a.m.)

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1 Q It says cardiovascular --

2 A -- and lung cancer. Expiratory wheezes  
3 bilaterally. Do you see that?

4 Q Wheezes, yes. What's a wheeze?

5 A That's a high-pitched musical sound. It's  
6 sort of (demonstrating) on exhalation, and it's  
7 typical of a bunch of different things. For  
8 example, it's typical of asthma. Children with  
9 asthma wheeze. Lots of parents have heard that.  
10 But it's also typical of chronic bronchitis and  
11 emphysema.

12 Q And -- go ahead.

13 A So we get to -- we get to probably some  
14 things which are not abnormal, but looking at a  
15 chest x-ray -- the patient needs a chest x-ray.  
16 He's not had one.

17 Q So somebody comes in to see you with these  
18 kind of symptoms, what do you do?

19 A We always get the chest x-ray. I always  
20 take a history. I always do a chest x-ray. I do a  
21 pulmonary function test in almost all cases.

22 Q Now, I know you didn't see Mr. Maddox, but  
23 what I want to -- I want you to share with the jury,  
24 if you would, is -- and I know you haven't talked

25 with Dr. Ludwig directly --

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1 A No.

2 Q -- but sharing the same profession. Tell  
3 us what would be going through your mind if this  
4 patient came to you and you saw exactly that at that  
5 time?

6 A Well, you know, I'm thinking of various  
7 different diagnoses. It's the responsibility of the  
8 doctor to think of the different possible  
9 explanations, but the red light that's flashing in  
10 my head is cancer, cancer, and I just am praying  
11 that that's not -- that we don't have that case  
12 again.

13 Q What do you mean "again"?

14 A Well, I see -- in my practice it's not  
15 unusual to see a new case of lung cancer every day.  
16 Between my partner and I, I mean, sometimes a week  
17 will go by and there will be a new lung cancer every  
18 day. So, when I see a patient that comes in like  
19 this, the thing is let's get the x-ray -- and, in  
20 fact, we do more; we do a CT scan. There's all  
21 kinds of issues about early diagnosis. But, anyway,  
22 we get an x-ray and we hold our breath until the  
23 patient comes back upstairs from the x-ray  
24 department with the film in his hand.

25 Q You hold your breath?

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1           A     Yes. I wait. I worry.

2           Q     Well, I mean, not to be facetious, but why  
3 do you worry? I mean, can't we cure these kinds of  
4 diseases?

5           A     Well, lung cancer is the game of the life  
6 of a lung specialist because lung cancer is  
7 generally not treatable. Now, some patients are  
8 wonderful. About five to ten percent of the  
9 patients are treatable and survive and do great and  
10 everything is fine. But the majority of patients,  
11 about 95 percent of the patients who have lung  
12 cancer will die despite all efforts, even if they're  
13 detected early.

14          Q     So, let's take us back to this: Would you  
15 agree that Dr. Ludwig acted correctly in getting a --  
16 in ordering a chest x-ray?

17          A     Yes, he started exactly right.

18          Q     And, incidentally, his pulmonary function  
19 is abnormal, FEV1, .42 liters at ten percent.

20          A     Right. In fact, the patient's FEV1 was a  
21 little bit better than when he was tested on a  
22 bigger machine. But what that means is that his  
23 lung function was terrible. It was much worse than  
24 what it should have been.

25                   That particular test suggests that his

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1 lung function -- he should have been able to blow  
2 out much more air than he was able to in one  
3 second. That's the FEV1.

4 Q Okay. Now, the chest -- are we up to  
5 Mr. Maddox getting his chest x-ray?

6 A Right. The chest x-ray was actually done  
7 on August 19th, '96.

8 Q All right. There was a little bit of a  
9 delay there, wasn't there?

10 A Yes, there was.

11 Q So August 19th there is a chest x-ray done  
12 and you have the -- we have the -- you have the  
13 chest x-ray report?

14 A I pulled out -- I tagged the x-ray report  
15 for you, and I have seen the x-ray, and I've given  
16 my own report on it.

17 Q All right. I don't want to take too much  
18 time. But just -- in essence then -- do we have the  
19 x-ray with us?

20 A Yes.

21 Q Oh, we do. We actually have the x-ray  
22 itself?

23 A Sure.

24 Q All right. So, tell us first, what did  
25 they do in West Palm Beach when they got this x-ray

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1 back, and then can you come up and actually show the  
2 x-ray to the jurors.

3 A Yes.

4 Q All right.

5 A Well, the x-ray showed a cancer. And it  
6 showed not just cancer; it showed a cancer extended  
7 to the chest wall; it showed fluid at the bottom of  
8 the left lung. And in order to better understand  
9 the anatomy and the whole structural problem, the  
10 doctors ordered a CT scan of the chest.

11 So, a CT scan was also done -- let me see  
12 what date exactly. The CT scan was done on the  
13 22nd, August 22nd, '96. So, two days after he had  
14 the -- three days after he had the chest x-ray he  
15 had the CT scan.

16 Q Now, can you chart both the chest x-ray  
17 and a CT scan here?

18 A Yes. Both are important. They show  
19 different things.

20 Q All right. I don't know if it's better to  
21 project this on a view box or on this overhead.

22 A Do we have a view box?

23 Q We have a view box in the courtroom.  
24 Would that be best?

25 A Actually the view box is much better.

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1 Q Okay.

2 A The projector is probably better for the  
3 CT --

4 Q All right?

5 A -- but the view box is much better for a

6 chest x-ray. While we set it up, if I just may say,  
7 that the chest x-rays and CT scans are different  
8 things. They're complementary.

9 Q All right. Well, I'll ask you, because  
10 while they're setting up we'll continue our  
11 conversation, not to waste time.

12 All right. So, I'll hold this up for now  
13 while she gets it. What do you call this?

14 A That's a regular PA, which stands for  
15 posterior, anterior, from the back to the front.  
16 The film was shot from back to front, a PA chest  
17 x-ray.

18 Q Doctors have been doing this for years?

19 A I think it's almost 100 years now.

20 Q And the CT, though, that's something new?

21 A Yes, that's new. That's only about 25  
22 years old.

23 Q Will you be able to read this chest x-ray  
24 for the jury and point out the important things on  
25 it?

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1 A Yes. That's my expertise.

2 MR. WILNER: Might we have the doctor come  
3 up and show the jury.

4 THE COURT: Certainly, if we can get the  
5 thing to work.

6 THE WITNESS: That's the challenge.

7 MR. WILNER: That's always the challenge.

8 THE COURT: Well, if we could determine

9     where it's going to be.

10               MR. WILNER: All right.

11               THE COURT: There's no need for him to  
12 stand down there, Mr. Wilner, until we're ready to  
13 go.

14               MR. WILNER: We could power that down for  
15 a second and then use the power to run this and then  
16 go back over.

17               All right. Let's see if it goes on. Okay.

18               THE WITNESS: It works.

19               MR. WILNER: May the doctor come down?

20               THE COURT: Sure.

21               MR. WILNER: Thank you.

22 BY MR. WILNER:

23       Q     So, I'll ask you, Doctor, on the record  
24 now, would you display the chest x-ray that was  
25 taken of Mr. Maddox to the jury and explain the

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1     significance of that x-ray.

2       A     The first thing a doctor does is look to  
3 see that it's actually a patient's chest x-ray,  
4 which I recognize. I also checked his name. This  
5 is a chest x-ray that was taken on Mr. Roland Maddox  
6 on August 19, 1996.

7               It shows multiple abnormalities  
8 approximately. The first and most important and  
9 obvious abnormality is a tumor mass. This round  
10 density is abnormal.



11           If I want to orient you, this x-ray is  
12 shot from back to front so it's as if you're looking  
13 at the person. Therefore, the person's right is  
14 your left. This is the patient's right side and  
15 this is the patient's left side.

16           I can tell you this: People spend their  
17 whole lives studying chest x-rays, and it's amazing  
18 how many things there are to see here, but some  
19 things are quite easy to understand. Some things  
20 are very subtle. For example, it's easy to  
21 understand that there are scapulae and clavicles and  
22 ribs. Do you see the ribs?

23       Q     Where is scapula on your body?

24       A     The scapulae are from here, these bones  
25 over here (demonstrating).

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1       Q     What's a common name for it?

2       A     A common name for the scapula?

3       Q     Yes. Where is it?

4       A     It's right over here (demonstrating).

5       Q     A shoulder blade?

6       A     A shoulder blade, thank you. This goes to  
7 show you -- thank you. Scapulae are shoulder  
8 blades, and then there is the clavicles, the collar  
9 bones.

10      Q     The collar bones.

11      A     Okay. Over here. And then, of course,  
12 there's a heart. The big central structure in the  
13 center is the heart. You see it's a little bit to

14 the left of the midline, but not that much. And  
15 then there is the bones. This is the bone of upper  
16 arm and the shoulder.

17 Q Where are the lungs?

18 A Well, the lungs are these structures  
19 inside here. You see this white hazy stuff is  
20 actually lung tissue. Now, this is a copy of a  
21 chest x-ray. Some of the detail is lost, but also  
22 there is detail lost because there is no lung at all  
23 up here as I show on the CT scan.

24 That's not normal. That's emphysematous  
25 destruction of the lung tissue up in the right

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1 upper. So, the reason it's so black is because  
2 there is none of this normal delicate lung tissue  
3 down -- as you can see down at the bottom of the  
4 right lung.

5 Now, action, the bad stuff is on the left  
6 side. Remember the patient's left is your right.  
7 And what we see is a soft tissue mass. Mass means a  
8 growth. Soft tissue means it's not a bone, and it's  
9 up against the chest wall. Here is the chest wall  
10 which is constructed of the ribs and the muscles of  
11 your chest. If you look you can see that it's a  
12 distinct subtle and actually it would be pretty easy  
13 to miss, but it's definitely there, and you can see  
14 that it's different than what it looks like over  
15 here on the right side. It's subtly different, but

16 it's distinct. To me it jumps out but that's  
17 because I've been doing this for 25 years.

18 Q So, what is the deal down there? The  
19 bottom of this lung doesn't look quite right.

20 A No, it's not right, and it doesn't look  
21 the same. That's one of the important things that  
22 doctors do is compare side to side because there is  
23 symmetry.

24 Do you see this over here? This is on a  
25 line which is called a meniscus. That's the line of

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1 fluid going up along the chest wall. So what this  
2 means is that this abnormality down here is caused  
3 by fluid, and I can show that on the side view in a  
4 second.

5 This over here is a diaphragm. We have a  
6 big muscle that separates our chest from our  
7 abdomen. And when you take a breath the muscle  
8 moves down, and that's what breathing is mostly.  
9 The muscle moves down and pushes your belly out a  
10 little bit and it lowers the pressure inside your  
11 chest, and the air comes from the atmosphere to your  
12 lungs.

13 So, this is the muscle; this is a shadow  
14 of the muscle that does that work. The shadow of  
15 the muscle on the left can't be seen because it's  
16 awash with fluid and that fluid is full of cancer  
17 cells.

18 Q So, how did it get awash way down there if

19 the cancer is up there?

20 A I'll show you on the other film, on the  
21 CT, but let me just show you -- let me just show you  
22 here.

23 Q On this.

24 A This is a side view. It's a little bit  
25 harder to understand actually. It's as if you're

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1 looking at the person like this (demonstrating),  
2 from a side view, so you can see that the shoulder  
3 will be up there and the breast bone and sternum  
4 will be over here, thinking of all the common  
5 names.

6 Q Yes.

7 A And you can see the spine. Do you see  
8 these bones? These are the spinous processes. They  
9 actually make up your backbone. And this line over  
10 here, that's real abnormal again. That's a fluid  
11 line.

12 The cancer itself is up here so you can't  
13 even see it up on this very well. It's actually  
14 probably one of these shadows. But this line is  
15 abnormal, very abnormal, and that means that there's  
16 fluid.

17 So, on the PA and lateral film I know that  
18 there's almost certainly a cancer. Why? Because  
19 there's a soft tissue mass that's full of fluid in a  
20 patient with emphysema, which that means he's got

21 cigarette smoking damage.

22 Q Show us the emphysema again?

23 A There are various areas, but the most  
24 important is the right upper lobe, as I'll show on  
25 the CT scan which has the dirty lung, the lung

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1 tissue has been virtually obliterated. There is  
2 also emphysematous change up in the left upper  
3 lobe. As well.

4 Q So, the next step is the --

5 A CT scan.

6 Q Okay. So we've got to -- we've got to  
7 unplug.

8 A You can on those.

9 Q Do you want to try it on there? You can  
10 use whatever you want, absolutely.

11 A I prefer the view box. It's my standard  
12 tool.

13 Q Okay.

14 A Okay. Now, this is a CT scan. It was  
15 taken on August 22, 1996, of Roland Maddox. It's a  
16 little harder to understand. Imagine now the  
17 patient -- you're not looking at the patient, but  
18 rather the patient is lying down flat. You're  
19 looking at his toes. And the machine, the computer,  
20 slices him, like as if you pushed him through an  
21 apple -- one of those things that cuts slices in an  
22 apple.

23 So we're going to slice the patient a

24 whole bunch of times in only one centimeter slices.  
25 And we're going to take one of these slices and flip

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1 it down, put it down on paper, and we'll line them  
2 all up. Obviously it takes a computer to do this.  
3 And this is, in fact, computerized axial  
4 tomography. That's what it's called, a CAT scan,  
5 computerized axial tomography.

6 So the patient had this, and what we're  
7 seeing here is up is top -- it's like he's lying --  
8 you know, you're looking at him and the top is up  
9 here. So up is front and this black hole over here  
10 is his windpipe, because these are the cuts that are  
11 right up here. There is no lung there. It's his  
12 windpipe.

13 And as you're working your way up -- and  
14 by the way, here is the spine. See the spinous  
15 process. Now, you work your way down and you get to  
16 the top of the right lung. Again, your right is the  
17 patient's left; his right is your left. You see  
18 it's marked on here. So this is the top of the  
19 right lung. And up there, right at the top of the  
20 right lung there is nothing; there's air and a  
21 couple of strands.

22 I don't know if you ask see it in the  
23 back, but those couple of strands is all that's left  
24 of the lung.

25 Q Which side?

1           A     That's the right side. I'm working my way  
2 down.

3                     Well, as I get down further -- and now I'm  
4 beginning to get more of the lung -- I'm beginning  
5 to see a couple of things. One is that there are  
6 great big holes in the right lung and eventually we  
7 get down to here and there are these big, big  
8 holes. These are called bullae.

9                     And that's virtually only seen in  
10 cigarette smokers. There are some rare situations  
11 where it occurs otherwise, but it's basically a sign  
12 of long-time heavy cigarette smoking. And, in fact,  
13 there are these bullae on the other side. This is  
14 the left side, you can see them, as well.

15           Q     What does it look like to be a bulla?

16           A     Basically a balloon that doesn't belong  
17 there, an air-containing balloon that's all that's  
18 left of the lung tissue in that area.

19           Q     If you'll remember which one you're on, I  
20 am going to project it later.

21           A     Yes, because it's hard to see.

22                     Now, there is something else. There is  
23 thickening of around the pleura. So as I'm coming  
24 all the way down I'm seeing some trouble here.  
25 There is thickening of the -- there must be fluid or

1 thickening of the tissue that surrounds the lungs.

2 I'm seeing trouble already.

3           As I work my way down until I get to image  
4 number ten -- so this is the tenth, one-centimeter  
5 image that they took, and boom. Actually you can  
6 even see it on image number nine and number eight a  
7 little tag of it. But here you see it on ten, and  
8 when you come down to 14 -- here is 14, here is  
9 number 14 -- and you really, really see it.

10           I think maybe we should --

11       Q    Yes, let's blow up image number 14. That  
12 way we can see how it looks.

13       A    And I'm going to work my way down also.

14       Q    I think that was too small to see. It has  
15 to warm up or something.

16           Now, you can work there or there, either  
17 way.

18       A    It's much better here.

19           MR. WILNER: In fact --

20           MS. HARTLEY: What image, Dr. Feingold?

21           THE WITNESS: Let's start with 14. Okay.

22 It's coming up. Okay. If you would -- there you  
23 go. Now you've got to try to focus.

24           MS. HARTLEY: I'm trying.

25           MR. WILNER: Stephanie is doing the honors

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1 today.



2 THE WITNESS: It's better. A little  
3 fussy, but that's all right.

4 MS. HARTLEY: That's as far as it'll go.

5 MR. WILNER: That's better.

6 THE WITNESS: Here we've worked our way  
7 down to image 14. Here is the windpipe still, so  
8 it's before even the windpipe or trachea divides  
9 into two.

10 The windpipe, as it comes down, eventually  
11 gets sort of to the top third of your chest and  
12 divides into two parts, into the two main bronchi,  
13 main stem bronchi, one to the right side and one to  
14 the left side. So this is even before it's divided  
15 and it's still in the big trachea level.

16 And at that level there is a big  
17 cancer-appearing mass extending -- this is in the  
18 left upper lobe where we saw it, remember, up  
19 against chest wall in a different projection. This  
20 is a cross-section before we look at a front  
21 section.

22 So here we see this big thing and it has  
23 several characteristics that are absolutely typical  
24 of cancer. Like I said, if I look at your face I  
25 know who you are, and if I look at this image then I

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1 know that this is the face of death; this is a  
2 cancer. This is lung cancer.

3 This is an ugly crab-like lesion or  
4 projection. Do you see the projections sticking

5 out? These are called spiculations. They're like  
6 fingers into the lung. Now, cancers don't behave  
7 properly. They invade their neighbors and they go  
8 into the rest of the tissue.

9 And there's worse, and that is, over here  
10 we've extended all the way into the pleura. It's  
11 not just up --

12 Q What's a pleura?

13 A The pleura is the coating of the lung.  
14 It's the delicate tissue that surrounds and encases  
15 the lung. The lung actually moves within two  
16 pleural sheets.

17 The problem with the pleurae is that it's  
18 richly supplied with blood vessels and lymphatics,  
19 lymph channels. And if cancer gets to it, which it  
20 obviously did -- you can see it indented into it.  
21 You see how it's indented? It's eating its way into  
22 the chest wall. When cancer does that, it spreads  
23 all over the body.

24 Q Well, have you seen cancers like that on  
25 CTs with your own patients?

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1 A Innumerable times. I don't know how many  
2 times, but it's a lot of times.

3 Q So this business of breaking through or  
4 going out to the pleura, what does that mean?

5 A It means that the patient is not a  
6 surgical candidate. We can't cut it out.

7 Q Why can't you?

8 A We could go and physically remove this  
9 portion, but it's too late because the cancer cells  
10 have gotten into the blood vessels and gotten into  
11 the lymph channels and they've broken off and  
12 they're going to the rest of the body. So taking  
13 this out doesn't improve the situation at all. It  
14 may even make it worse.

15 Q But why --

16 A I'm going to work my way down, also.

17 Q Yes, I know. I just want to ask this:  
18 Why couldn't that have been caught before it did  
19 that spreading?

20 A The problem with cancer is that it very  
21 often -- even at the earliest point of detection  
22 it's untreatable. The studies -- huge studies have  
23 been done where patients are tested with x-ray for  
24 years. The patients who are at risk of getting lung  
25 cancer are tested with chest x-rays, are watched and

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1 watched and watched to look for the very first  
2 moment where they detect an abnormality, lung  
3 cancer, and it doesn't make your life-span any  
4 better.

5 So what happens is, if the cancer, if it  
6 grows, it starts growing, and very soon after it  
7 starts growing it sends a finger, it sends an  
8 invading army into a candy store.

9 Q Are there other signs of spread that -- I

10 don't know if you can see from this focus, but --

11 A Yes, and we work our way down. Let's go

12 down -- I'll tell you what image.

13 Let me get my --

14 MS. HARTLEY: Do you know what image?

15 MR. WILNER: In a second. I think we're

16 going to be on that one in a second.

17 Your Honor, while we're looking, could we

18 have one minute with Your Honor.

19 THE COURT: Sure.

20 THE WITNESS: Could you stand by, Doctor,

21 and we'll be right back.

22 (Side-bar conference held outside the

23 hearing of the jury)

24 MR. WILNER: I do this to save time.

25 Yesterday there was an objection to Dr. Feingold

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1 going on further about asbestos. And I was of the

2 impression during that exchange that the defendant

3 had sort of implied that they were not going to have

4 anybody say anything about asbestos either.

5 But I realized that when I went home I

6 didn't really hear that, so I want to make sure if

7 we're not going to talk about the absence of

8 asbestos disease then I'm happy not to. I want to

9 hear it from them that they're not going to talk

10 about it either.

11 THE COURT: Do you mean in relation to

12 Mr. Maddox?

13 MR. WILNER: Sure. Absolutely.

14 MR. NYHAN: Well, we're not going to argue

15 that he had asbestos-related disease.

16 THE COURT: Okay.

17 MR. WILNER: Are you going to argue that

18 asbestos was a contributing cause to his death?

19 MR. NYHAN: No.

20 MR. WILNER: Okay. With that assertion,

21 we can stop 20 minutes of discussion.

22 THE COURT: Okay. I thought we were at

23 that place yesterday.

24 MR. WILNER: I just wanted to mention it.

25 THE COURT: I understand.

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1 MR. WILNER: Thank you.

2 (Side-bar conference concluded;

3 proceedings resumed before the jury.)

4 BY MR. WILNER:

5 Q Okay. Dr. Feingold, what is this?

6 Sorry to be eating. I had a sugar fix.

7 A This is much lower in the chest. What

8 we've done is we've -- in the interest of time I've

9 stepped down a whole bunch of images. We've

10 actually gone past the windpipe and division of the

11 main bronchial tubes.

12 MR. NYHAN: Excuse me, Your Honor, may I

13 interrupt? Is this image 28?

14 THE WITNESS: This is image 28, yes.

15                   Here we see the heart. It's forward.  
16   It's anterior.  
17           Q     Anterior?  
18           A     Forward, front of the chest. And we  
19   actually see the big aorta. We're splicing through  
20   it.  
21                   But here we have another lesion. This is  
22   something else. See. This is not part of that  
23   other thing that we saw up against -- this is not  
24   the cancer. Can we flip back for a second to the  
25   cancer.

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1                   MR. WILNER: You're doing a great job,  
2   Stephanie.  
3           A     Here is the cancer. By the way, show  
4   that. I can see the holes in that. That's not  
5   normal either. That's cavitation. Those are holes  
6   in the --  
7           Q     That's the left. That's image of the  
8   left, just for the record.  
9           A     Yes.  
10          Q     Remember before you said these are the  
11   emphysematous bullae or the -- where are they?  
12          A     Over here on this particular image. Do  
13   you see this? This is the wall of the bullae. No  
14   lung inside. The lung tissue is supposed to be  
15   looking more grayish. Even this lung is not  
16   normal. But you see this? That's the wall of the

17 bullae. You see this. This is another wall of the  
18 bullae and another wall of the bullae and another  
19 wall of the bullae. There are countless balloons  
20 that don't belong there.

21 Q Let me just get it straight. The  
22 emphysema is not the same disease as the cancer?

23 A Correct, but it's caused by the same  
24 thing, the smoking.

25 Q Is it something that you consider when

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1 deciding whether the cancer is caused by smoking?

2 A Yes.

3 Q How -- because?

4 A Because emphysema is a marker of lung  
5 damage from cigarette smoking. It is just more of a  
6 sign that the lung was physically damaged by smoking  
7 and so I know if the lung is damaged in that way by  
8 smoking, it also can be damaged in another way by  
9 inducing the cancer.

10 Q Then you were talking about these little  
11 holes are actually inside the cancer?

12 A Inside the cancer.

13 Q Why would there be holes inside a cancer?

14 A Because the cancer grows faster than the  
15 blood vessels so a cancer can keep up. The cancer  
16 actually sends messages to the blood vessels to grow  
17 into them, to supply them, but the blood vessels  
18 cannot keep up with some of the cancers, especially  
19 aggressive cancers and totally differentiated

20 cancers. They grow wild and they grow into the lung  
21 tissue and the blood vessels can't even supply them  
22 so some of the lung cancer actually dies. When the  
23 cancer dies it breaks down and creates holes within  
24 itself.

25 Q Isn't it good that it died?

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1 A It would be good if we cut off the blood  
2 supply completely and then it would go away. But  
3 the fact that that's -- that's very hopefully  
4 research for the future. But in the meantime we  
5 can't do anything to the cancer to make the blood  
6 vessels stop growing and stop supplying it, so most  
7 of it grows.

8 When it dies it breaks down and makes --  
9 other blood vessels spread and send the cancer cells  
10 elsewhere so it's terribly -- and it causes coughing  
11 up of blood, which at this point the patient had.

12 So these holes are exactly consistent with  
13 what I know about what he told the doctor, which was  
14 at this point he was coughing up blood.

15 (Change of reporters, 10:00 a.m.)

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1 Q All right. Which one are we looking at? 28.  
2 A Okay. So now this, as I said, this is way  
3 lower, and here what you see is called a pleural  
4 implant. See? A pleural implant. What that means is  
5 that, remember, the cancer spreads into the pleura up  
6 above, and I said they are lymphatic, lymph vessels,  
7 lymph channels and blood vessels in the pleura, and some  
8 of the cancer cells just work their way down, if only by  
9 gravity, and they start to take up residence right there  
10 on the pleura, and they have formed another tumor mass  
11 right over there. So that's a pleural implant. That's  
12 a metastasis.  
13 Q What does that word mean?  
14 A Metastasis means spread of cancer, spread  
15 outside of the original place. All right.  
16 Now let's work our way down a little bit  
17 further. You will see that this thing, this  
18 metastasis -- let me just look here, look at this one  
19 and then this one. Start with this one. See what  
20 happens?

21 MR. NYHAN: This is image --

22 THE WITNESS: 33.

23 A We are now in image 33. This still is that  
24 portion of the pleural implant, but see what it's doing?  
25 It starts to be in continuity with the pleural. Look,

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1 see this fluid? There is the line of fluid. Look how  
2 it blends right into the pleura implant. That's not  
3 surprising. That's exactly that.  
4 Look on the right side. The right side of the  
5 pleura is completely normal. Okay. The left side, look  
6 how the pleura is thickened. Remember, on the chest  
7 x-ray I was worried. I saw right there on the top there  
8 was something wrong with the pleural. Well, here is  
9 what the cause was. This pleural implant has worked its  
10 way -- actually, continuously causing fluid collection,  
11 and this fluid over here was eventually tapped -- show  
12 the film that next --  
13 Q When was the first time you ever in your  
14 career got to see one of these kinds of CAT or CT images  
15 with this kind of detail?  
16 A CT image? Probably -- let me see now. It  
17 would have been about 23 years ago or so, 25 years ago.  
18 23 years ago.  
19 Q Doctors had never seen this before, before it  
20 opened up --  
21 A No, no. This is a fabulous machine. This is

22 a way of looking inside you. So, I can see inside you  
23 without opening you, without making a hole in you. I  
24 can actually -- in fact, I can even make images that are  
25 a millimeter thick instead of a centimeter thick, and

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1 then I am looking inside you almost like with a  
2 microscope. So this is a fantastic advance in the  
3 diagnosis of cancer.

4 Q Now what does this one show. This is 34.

5 A This is 34. And my -- where is the light?

6 And what we see now is that fluid. Remember, on the  
7 chest x-ray, the regular chest x-ray which was taken  
8 three days before this film, this shows the fluid  
9 accumulating down at the bottom of the lung. See, the  
10 patient is lying with his -- with his front up. So here  
11 is his back, and there you can again see his spine. See  
12 the spinous process.

13 So he is lying on the table on his back, and  
14 the fluid, because it's free-flowing, actually  
15 accumulates by gravity to the bottom, and that's why  
16 it's collecting over here. So here we see some fluid,  
17 some pleural thickening, and here is this whole  
18 collection of fluid.

19 And if you go one more step down, there is all  
20 of the fluid. And that's causing the meniscus --  
21 remember on the pH chest x-ray there was that line, the  
22 meniscus. Well, there it is in a different projection.  
23 Now we lay the patient down instead of standing the  
24 patient up. It does the same thing.

25 Q Pardon the stupid question, but why can't you

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1 pump the fluid out and be done with it, and cut the  
2 cancer out, everything is okay.

3 A Well, that's not the stupid question, because  
4 that's the question that my patients ask me.

5 MR. NYHAN: Your Honor, may we have the  
6 witness resume the stand?

7 THE WITNESS: Yeah, I'm finished.

8 MR. WILNER: That's fine.

9 THE WITNESS: Thank you.

10 Q All right. If you want that back up, let us  
11 know. I will ask you a few more questions. Okay.

12 A Why is it not a stupid question? Because the  
13 problem is that the lung is now a wash, is sloshing  
14 along in cancer cells. That fluid is not just a liquid  
15 or water. It's fluid that the pleura produces in  
16 response to the irritation of the cancer cells  
17 themselves. And the lung then gets coated, completely  
18 covered in these cancer cells which then get into other  
19 blood vessels, spread within the lung and spread  
20 throughout the body. So taking the fluid out, which is  
21 sometimes necessary just to give the patient room to  
22 breathe, is not going to work for long and doesn't cure  
23 the problem.

24 Q Remember I said, you know, I just wanted your  
25 impressions to aid us in an understanding of what this

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1 disease process was. I wanted you to kind of, as a  
2 figure of speech, become Dr. Ludwig, or make believe  
3 that this had been your patient just for the point of  
4 illustrating to the jury.

5 So let me just ask you, when -- if this had  
6 been your patient, or someone like Mr. Maddox had had  
7 this same disease, and they had come back, do they --  
8 how does the -- what happens? Do they go downstairs for  
9 the chest --

10 A They go downstairs to our x-ray department in  
11 the hospital and come back upstairs with the films in  
12 hand.

13 Q In their hand?

14 A Yeah.

15 Q Of course, they don't know what's in them,  
16 right?

17 A That's not the way -- I mean, they are  
18 supposed to sit down in my office. The radiologist  
19 doesn't tell them, but I get the call from the  
20 radiologist, and we talk. I put the films up on the  
21 board, and we talk about them. He has got the films on  
22 the computer, and I have got the films on my board, and  
23 we talk about the films. Just another example of  
24 doctors working together, the lung x-ray doctor and me  
25 together.

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1 Q So, you have seen this -- these chest x-rays  
2 and these CT scans with this thing, this cancer.

3 A Innumerable times.

4 Q And let's say the patient comes up and has  
5 the films, and you have seen the films. You are -- with  
6 that -- you know, that's the beginning of the question.  
7 Now, you are, as you told us, chief of the pulmonary  
8 department, right?

9 A Right.

10 Q Do you have at your disposal maybe not every  
11 possible machine and device and knowledge in the -- in  
12 medical science in the world, but do you have it close?

13 A I think we have it pretty close. We have  
14 access to just about everything.

15 Q You have the finest of imaging equipment, the  
16 finest CT's and so forth?

17 A I think we have incredibly good imaging, yes.

18 Q Did you find anything deficient in the  
19 hospital that treated Mr. Maddox incidentally?

20 A No. These are perfectly good images and  
21 perfectly good diagnostic process.

22 Q So do you have some power, then, in general  
23 to treat disease? Is that -- I mean, is that why we  
24 have constructed these hospitals and these machines and  
25 trained the people?

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1 A We certainly have power to diagnose the  
2 disease. We don't always have the ability to treat or

3 cure.

4 Q Well, I guess this is my question. When this  
5 comes up looking like this, are you a powerful man at  
6 that point?

7 A I am not a very powerful man anyway. I am  
8 helpless. In that situation I can do almost nothing. I  
9 just -- actually, in that situation what I do is I steal  
10 myself and I give myself a few minutes and I bring the  
11 patient into the office, and I sit them down. And  
12 hopefully with the wife or the husband, and they sit in  
13 my -- in the chair in front of my desk, which is a  
14 terrible place to be, and --

15 Q Well, I am sorry. Excuse me a minute.

16 MR. NYHAN: Your Honor, may we be seen at the  
17 side bar.

18 (Side-bar conference held outside the hearing  
19 of the jury)

20 MR. NYHAN: I object to the blatant appeal to  
21 the jurors' sympathy, passion and prejudice by this  
22 routine going on between counsel and the witness and ask  
23 that you order a break right now so that this doesn't  
24 continue.

25 MR. WILNER: I don't know what he is talking  
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1 about. I am trying to get through some -- we are  
2 talking about life and death here. What does he want us  
3 to do? It's not a tea party. He has got to be able to  
4 explain the significance of this disease process. This  
5 is the way that he does because he faces it every day.

6 THE COURT: I don't have a problem if you can  
7 control your emotions and he can control his.

8 MR. WILNER: I will. I will do my best.

9 THE COURT: He is a professional witness. He  
10 is not a member of the family, and we are talking about  
11 Mr. Maddox's case, and he didn't even see Mr. Maddox. I  
12 understand that it's not a pleasant task for any doctor  
13 to tell someone you are dying, and there's nothing I can  
14 do for you, but he didn't even do that to Mr. Maddox.

15 MR. NYHAN: That's right.

16 THE COURT: If you were recreating the scene  
17 with Mr. Maddox sitting here and he couldn't help  
18 himself, then I might allow it, but, I don't think it's  
19 fair if he can't control his emotions.

20 MR. WILNER: We will do our best to control.  
21 I will take a break if I can. I will.

22 THE COURT: If you say you need a break --

23 MR. WILNER: Okay. I will.

24 THE COURT: I'll leave it up to you.

25 MR. WILNER: Thank you.

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1 (Side-bar conference concluded; proceedings  
2 resumed before the jury)

3 Q I am not trying to draw it out, but I just  
4 need you to tell us just -- I don't know. In your  
5 office, is that -- do you meet your patients in your  
6 office?

7 A Yes.

8 Q And including patients that come in with this  
9 kind of news?

10 A Right.

11 Q And just tell us in general what happens to  
12 illustrate to the jury the significance of this disease  
13 process.

14 A Well, this process is basically an  
15 untreatable process. We can make patients feel better,  
16 and we can often prolong their lives by some degree, but  
17 it's a big fight to even obtain even a few more months  
18 of life, and it's unpleasant. So, we go through this  
19 process.

20 I tell the patients and the family what's  
21 wrong, and I promise them that -- that all of the forces  
22 of the hospital will be brought to bear to help them or  
23 prolong their life, relieve their suffering and make  
24 them better. Sometimes I have happy news. Sometimes I  
25 say, look, I see a small tumor. I think I can treat it,

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1 I think we can remove it, and I think you will be all  
2 right. But most of the time it's like this.

3 And I tell people that they -- that they have  
4 a very bad illness and that we are going to try  
5 radiation therapy and chemotherapy and get them as much  
6 better as we can, and that we are there to help them.

7 Q And what is the impact on you?

8 MR. NYHAN: Objection. Irrelevant, Your  
9 Honor.

10 THE COURT: Okay. I will sustain the  
11 objection.

12 Q When you see this kind of -- and, again, I am  
13 not -- we are not going to draw this out, but when you  
14 see this kind of disease, as you've just pointed out,  
15 what -- what is your understanding of what awaits the  
16 patient?

17 A I know exactly what awaits the patient. I  
18 have a very clear -- this technical understanding of  
19 what awaits the patient because I have been through it  
20 so many times and because I have studied it so  
21 carefully, I know what the situation is.

22 You know, there is some variability. Some  
23 people live a little bit longer, some people live a  
24 little bit shorter or die within a month, but I know  
25 that the patient's -- the rest of the patient's life is

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1 going to be torment and brief, and that the patient and  
2 his or her family will suffer terribly. And I can just  
3 see it. It's like I time travel through my mind, and I  
4 know, boom, what's going to happen. I have been through  
5 it so many times. And at the same time I am going  
6 through it with the people.

7 MR. NYHAN: Objection, Your Honor.

8 THE COURT: All right. I will sustain the  
9 objection.

10 Q Have you -- have that -- has this thing that  
11 we have been discussing, is that something that happens  
12 to you daily -- or not every day, but frequently?

13           A       It doesn't happen to me every day, but it  
14 happens frequently.  
15           Q       Do you -- have you in your research and study  
16 determined in general what force or what product is  
17 responsible for most of the people that you see being in  
18 this condition?  
19           A       Yes.  
20           Q       What is it?  
21           A       It's cigarette smoking.  
22           Q       Now let's just go on with a few more -- a few  
23 more records, and we will be done with this. We are  
24 back to August 29th, 1996, and this is Roland Maddox.  
25 Now, I am going to ask you a few more things. It says.  
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1 "bronchoscopy negative." What does that mean?  
2           A       It means that Dr. Ludwig did a bronchoscopy  
3 procedure. That was the procedure I described in the  
4 fiber optic scope, and he got as far as he could in the  
5 chest, took liquid fluid from the -- from the bronchial  
6 tubes, not from the pleural fluid, but bronchial tubes,  
7 and sent it to the laboratory, and did not show definite  
8 cancer cells.  
9           Q       Does that mean it was okay?  
10          A       No.  
11          Q       Why?  
12          A       It just means that the test wasn't  
13 successful.  
14          Q       So, did they do something else?  
15          A       Yes.  
16          Q       What?  
17          A       A needle biopsy.  
18          Q       What is that?  
19          A       That's when the patient lies on that same CT  
20 table where we take the CT scans, and a needle, a local  
21 anesthetic is put in the skin or muscle, and then a  
22 special needle which is hollow is passed right into the  
23 cancer itself while watching under the CT, and a biopsy  
24 is taken. And that core of tissue is sent to the  
25 laboratory.

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1           Q       It says there was a lesion on the liver that  
2 possibly is a hemangioma.  
3           A       Correct.  
4           Q       But could be metastatic. What does that  
5 mean?  
6           A       Actually, there were three lesions on the  
7 liver, as it turns out. Hemangioma is just a collection  
8 of blood vessels. It's not abnormal. People have that.  
9 But, in fact, the patient had other lesions, one of  
10 which was hot, meaning one of which lit up with the  
11 scanning, and it was a metastasis as well.  
12          Q       And a metastasis, one more time?  
13          A       Spread of cancer.  
14          Q       And some small mediastinal nodes. Why is  
15 that important?  
16          A       More bad news. It means that the cancer has  
17 spread to the lymph nodes in the central portion of the

18 chest.  
19 Q And this says it appears to have relatively  
20 low -- and I can't read that. Can you?  
21 A I think that was --  
22 Q I don't know.  
23 A I don't remember.  
24 Q Is that something -- explain why sometimes  
25 medical records have things written on them.  
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1 A Because, you see, what happened, this was a  
2 dictated note, and the transcriptionist didn't  
3 understand what the doctor said.  
4 Q Okay. So it goes on after that gap, whatever  
5 that means, relatively low something -- lung-like  
6 lesion? Relatively low lung-like lesion? His needle  
7 biopsy showed large cell lung cancer?  
8 A Right.  
9 Q And is that one of the primary types of lung  
10 cancer?  
11 A Yes. There were different ways of dividing  
12 up lung cancer based on what it looks like, and it's --  
13 it is one of the four main types of lung cancer.  
14 Q And is it predominantly caused by cigarette  
15 smoke?  
16 A Well, large cell lung cancer is caused almost  
17 only by cigarette smoke, and there's practically no  
18 large cell lung cancer in people who are not smokers.  
19 It virtually does not appear.  
20 Q Let me just fast forward a minute. One of  
21 the witnesses for the cigarette company has said that  
22 it's his opinion that it is an adenocarcinoma, not a  
23 large cell cancer. Let me just ask you to assume that.  
24 Would that make any difference to you in terms of what  
25 caused it?  
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1 A No, of course not. I mean, adenocarcinoma  
2 always occurs almost only in cigarette smokers.  
3 Adenocarcinoma in some cases, a few cases, occurs in  
4 nonsmokers, but it's also a disease essentially of  
5 cigarette smokers.  
6 Q Do you agree with the diagnosis that was done  
7 by Dr. Ludwig in West Palm Beach?  
8 A Yes.  
9 Q Without going into endless detail, you have  
10 looked through all the records. Do you agree in  
11 essence, in essence, with his care and treatment,  
12 diagnosis, there?  
13 A Yes. I do.  
14 Q The -- on this question of large cell cancer,  
15 do you have experience with treating that or diagnosing  
16 it at least?  
17 A Sure.  
18 Q And is there anything about the way that this  
19 case presented that leads credence to the diagnosis made  
20 at -- in West Palm Beach?  
21 A Yes.  
22 Q What?

23           A       Well, large cell lung cancers like  
24 adenocarcinomas tend to develop in the periphery of the  
25 lung and tend to be more on the outside of the chest  
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1   than the center portion of the chest. So that's  
2 consistent. But large cell carcinomas are more  
3 aggressive. They are worse actors. They are poorly  
4 differentiated.

5           Q       Wait, wait, wait, I am going to stop. You  
6 used the "peripheral." What does that mean?

7           A       On the outside of the lung. You know, the  
8 lung is thick, so it goes all the way from the central  
9 portion of the chest out towards the chest wall. Right?  
10 So it's three-dimensional. On the outer portion of the  
11 lung is where large cell carcinoma typically but not  
12 invariably develops.

13          Q       Let me represent to you that in evidence in  
14 this case the Tobacco Institute has claimed that the --  
15 that peripheral tumors aren't due to cigarette smoking  
16 because the carcinogen in cigarette smoke don't get all  
17 the way to the outside of the lung. Let me ask you to  
18 assume that's in evidence here, and we will dig that out  
19 in a second. Can you comment on that concept?

20          A       Well, that's foolishness. That's nonsense.

21          Q       Does smoke go all the way out to the --

22          A       All the way to the alveoli, the air sacks,  
23 everything.

24          Q       Do carcinogens in cigarette smoke also get in  
25 the blood?

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1           A       Exactly. Some of the carcinogens get  
2 dissolved into the bloodstream, and then even after the  
3 person has finished smoking that particular cigarette,  
4 they keep on getting pumped and pumped and pumped into  
5 the tissue all the time in the bloodstream.

6           Q       All right. So you were saying that something  
7 about this case -- or does something about Mr. Maddox's  
8 presentation remind you of large cell cancer?

9           A       Right. As I said, it was in this patient's  
10 case an aggressive tumor. It broke into the pleural  
11 space, and, you know, oftentimes if we have a relatively  
12 small adenocarcinoma, which this was -- I mean, it  
13 wasn't huge up in the top of the left lung. It often  
14 stays there for a little while, you know, and doesn't  
15 necessarily go right into the pleura.

16                   But what happened here was that the man has  
17 the disease probably -- probably in April, that is,  
18 invasive active disease. He has the cells there for  
19 maybe his lifetime, since he started to smoke  
20 cigarettes. But the active disease is there and  
21 growing, but it moves pretty quickly, because he is dead  
22 by May of '97. And so this is an aggressive tumor that  
23 broke into the pleural space that got into -- made  
24 pleural fluid, got into the mediastinum, caused  
25 peripheral metastasis. Bad actor.

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1 Q Let me look at the medical record from May  
2 11th -- I think it's May 15th, 1997, and see what --  
3 this is from Dr. Velasquez, and tell me what this is.  
4 Before we get to here, I think we have skipped over  
5 something, so hang on. I got ahead of myself.

6 What happened to Mr. Maddox after this --  
7 after he came with this chest x-ray and his -- and the  
8 needle biopsy and the lung cancer diagnosis?

9 A Well, he saw an oncologist. He saw some  
10 oncologists, meaning cancer specialists. These are  
11 doctors who work with the lung specialists and give  
12 medicines like chemotherapy to try and slow the progress  
13 of the disease. He got various kinds of chemotherapy,  
14 and he eventually developed a whole series of  
15 complications typical of lung cancer.

16 Q Like?

17 A Like he got a stroke.

18 Q Why does a stroke have anything to do with  
19 lung cancer?

20 A Well, a stroke means a blockage of a blood  
21 vessel in the brain. And remember that he had this DVT,  
22 deep venous thrombophlebitis in April of '96, a blood  
23 clot on the inside of his right leg even before his lung  
24 cancer was recognized.

25 The same process is still going on, and what  
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1 happens is that the blood becomes hypercoagulable.  
2 That's a good word. It means that it clots more readily  
3 than it should. It's the body's useless but  
4 nevertheless attempt to prevent further injury. When  
5 you are cut, when you suffer a wound or if you are  
6 injured, the body produces more chemicals to clot off  
7 the blood. It's a natural phenomenon. So oftentimes  
8 people who have lung cancer produce more of this stuff,  
9 and they clot more readily, and then they start getting  
10 complications of the clotting like a stroke in this  
11 patient's case, and then he had multiple episodes of  
12 DVT. So he had multiple, multiple episodes.

13 Q What is DVT?

14 A Deep venous thrombophlebitis, in all kinds of  
15 areas in his body. He had lots more clots and needed to  
16 be hospitalized a whole series of times.

17 Q And is this typical of lung cancer --

18 A It is.

19 Q -- patients?

20 A It is. It doesn't happen in every case, but  
21 it's typical of lung cancer.

22 Q And was the treatment able to stop the  
23 cancer?

24 A No. No. The treatment was not able to stop  
25 the cancer. The treatment was able to treat the clots,

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1 the blood clots and infections and things that he got,  
2 but -- and treatment was successful in the sense that he  
3 lived from the time of diagnosis until May of '97.

4 Q Did he lose weight during that time?  
5 A He lost a lot of weight. The medical records  
6 say he lost like 50 to 60 pounds.  
7 Q Why does that happen?  
8 A It happens for more than one reason. The  
9 cancer cells are very consumptive of energy. They suck  
10 up all the food that the person actually can eat, and  
11 also they -- having a cancer reduces a person's  
12 appetite. So they can't eat and they can't utilize the  
13 food that they do eat, so they typically lose weight  
14 badly.  
15 Q Do you give patients how many months or years  
16 they have to live?

17 A They ask me.

18 Q Do you tell them?

19 A It depends. I mean, I need to tell patients  
20 to prepare things, and patients have a right to  
21 understanding everything about their own bodies. Some  
22 people are not able to understand. Their too old or too  
23 feeble. And also we don't know.

24 I mean, what we typically say in the beginning  
25 is, look, we don't know. There is a range of time that

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1 people survive, and that we will give all kinds of  
2 medicine to make sure they live as long as possible.  
3 But pressed -- I am often pressed -- and I tell people,  
4 look, they are going to live about a year.

5 Q Now when -- I think there was a half report.  
6 Is there something called staging, a staging of a tumor?

7 A Yes.

8 Q And does that -- is that an expression of how  
9 much it has grown or spread at the time?

10 A More than one thing is considered, but  
11 staging is very important in all -- in treatment of all  
12 cancers. Doctors do this not just with lung cancer but  
13 with every kind of cancer.

14 There are certain staging systems that are  
15 used. And the reason is, is because the stage of the  
16 cancer determines two things: One, what kind of  
17 treatment is appropriate, because for Stage IV lung  
18 cancer surgery is not appropriate. It's harmful to the  
19 patient. So you shouldn't do it.

20 And, two, the second thing that the staging  
21 does is it helps the doctor know how long a patient will  
22 live, because there are studies that are very reliable  
23 that tell the doctor how long the patient will survive  
24 given a presentation with Stage I, II, III, IV lung  
25 cancer.

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1 Q Okay. And I think Stephanie helped us and  
2 was able to find what I was looking for. And show us  
3 what date this is. Oh, okay. This is just a mention --  
4 I just wanted to bring this up in terms of stage. This  
5 is a discharge summary for a -- we just need to know the  
6 date, I guess?

7 MS. HARTLEY: It's 10/13/96?

8 Q 10/13/96. Six months or so, seven months --

9 six months after -- two months after diagnosis. Just to  
10 ask you about this staging, on this record it says the  
11 following data. Patient was seen in consultation with  
12 Dr. Schultz due to Stage IV-B. Roman numeral IV-B.  
13 Just explain briefly what that is.

14 A I won't go through all the different stages,  
15 but the bottom line is that if there is evidence of  
16 spread of the cancer beyond the chest itself, then  
17 it's -- there is considered to be metastasis. And the  
18 way this works is that there are -- briefly, it's a TNM  
19 system.

20 T stands for tumor itself, and there are  
21 various criteria for how big it is and what it does and  
22 whether it extends to the pleura, stuff like that.

23 N stands for nodes, meaning whether or not  
24 they are mediastinal lymph nodes in the chest. And M  
25 stands for distant metastases. If there are distant

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1 metastases, and there were in this patient's case, it's  
2 a Stage IV automatically. Clearly, this patient was to  
3 be expected to be at Stage IV because his tumor extended  
4 to the pleura and involved the pleural fluid. It was a  
5 Stage 4 lung cancer at the time of presentation.

6 Q Okay. Let me show you real quick the -- and  
7 is that the worst?

8 A That's the worst, but if you have III-B, it's  
9 just as bad.

10 Q There is a chest x-ray report taken on the  
11 19th. I think we looked for that earlier, and I  
12 couldn't come up with it. And I just want to ask you if  
13 you agree. It says, Impression, severe underlying COPD,  
14 poorly defined soft tissue mass in the left upper lobe,  
15 which is -- which is chest wall base measuring  
16 approximately three by three centimeters. This is  
17 spiculated and malignant. C, cannot be excluded. A  
18 left effusion cannot be ruled out. Correlation with  
19 previous films if available is recommended. If  
20 unavailable or this is a new finding, a CT scan of the  
21 chest for further evaluation is recommended. Do you  
22 agree?

23 A Standard language, and I agree exactly.

24 Q A hundred percent?

25 A A hundred percent.

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1 Q All right. So, did the doctors in West Palm  
2 Beach do all they could for Mr. Maddox?

3 A Yes.

4 Q And did he reach a state where he was  
5 transferred to a hospice?

6 A Correct.

7 Q And let me just show you that first. Is this  
8 a typical record of transfer to a hospice?

9 A Yes. This is a Certification of Terminal  
10 Illness.

11 Q Is this the kind of thing that a doctor would  
12 certify that someone has to go to a hospice because  
13 there is really nothing more that can be done?

14           A       Yes, doctors are required under various  
15 Florida laws and for various reasons, doctors are  
16 required to determine whether or not a patient's illness  
17 is terminal or whether or not there is any hope for  
18 meaningful recovery.

19           Q       And so was it your understanding that  
20 Mr. Maddox was transferred to a hospice and died there?

21           A       Yes. He was actually admitted --

22                   MR. WILNER: Let's take a break.

23                   THE COURT: We can take the mid-morning break  
24 at this point. It's 10:30. I am going to ask that you  
25 be back in the jury room at ten minutes till eleven.

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1 Please do not discuss the case among yourselves or with  
2 anyone else.

3                   Mr. Wilner and Mr. Nyhan, can I see you.

4                   THE BAILIFF: Court is in recess until ten  
5 minutes to eleven.

6                   (Jury exits courtroom; discussion off record  
7 and recess)

8                   (Change of reporters, 10:30 a.m.)

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1                   (Proceedings resumed, jury absent)

2                   THE COURT: All right. Are we ready?

3                   MR. NYHAN: Your Honor, could we approach  
4 side bar.

5                   (Side-bar conference, jury absent)

6                   MR. NYHAN: Your Honor, after you gave  
7 instructions to plaintiff's counsel to have  
8 Mrs. Widdick leave the hall, she didn't. The

9 alternate juror, Mr. Burk, got out into the hall and  
10 heard her -- I don't know what she was saying.

11 But in any event, Your Honor's instruction  
12 wasn't followed. The juror was out in the hall with  
13 Mrs. Widdick and, then ultimately, I guess,  
14 Mrs. Widdick left. But I want to just make a note  
15 of that for the record.

16 And other jurors attempted to come out,  
17 too, but I think the bailiff kept them away for a  
18 while.

19 MR. WILNER: And I want to say something  
20 to. I feel this faint smear every time this  
21 gentleman opens his mouth these days, and I just  
22 need to say something.

23 Mrs. Widdick was physically ill. She was  
24 collapsed outside. I came out and I said, We must  
25 get her moving, and she was collapsed. She was

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1 hysterical. We couldn't move her. I went  
2 immediately to the bailiff and I said, Please keep  
3 the jury in.

4 I cannot imagine that I'm being smeared  
5 every time this man opens his mouth. I say only  
6 that. I don't want to get into this. It's not  
7 proper.

8 THE COURT: Mr. Wilner, I didn't hear it  
9 that way, okay?

10 MR. WILNER: All right. Maybe I'm --

11 THE COURT: I heard it more from the  
12 standpoint he was saying that despite our warning,  
13 the juror still heard her or one of them did.

14 MR. WILNER: He used the term your order  
15 was not obeyed and that is not what happened

16 THE COURT: Well, I didn't put that on the  
17 record, but I will now that what I said to you at  
18 the side bar was please get her out of the hall  
19 because she was -- when she left the courtroom, she  
20 could hardly walk, and she was hysterical.

21 And I do not have a problem with  
22 Mrs. Maddox or Mrs. Widdick sitting there and  
23 crying. They have been for a while, and it's a  
24 natural reaction, and they've been quietly doing  
25 it. But, you know, we either need to recess or keep

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1 her out of the courtroom while this testimony is  
2 going on if she can't stand to hear it.

3 MR. WILNER: She's gone.

4 THE COURT: I understand that. But I'm  
5 talking about it's -- because I can't have the type  
6 of emotional reaction in front of the jury. Once  
7 again, I'm not talking about any emotional  
8 reaction. And if you couldn't feel like you can't  
9 control yourself or the doctor can't control  
10 himself, we'll take a recess at any time for about  
11 five minutes.

12 I don't mean particularly you. I'm  
13 talking about anybody during this whole trial.

14 Mrs. Maddox has been sitting there dabbing her eyes,  
15 which was fine, and she's hidden by the back -- not  
16 blackboard, but by the poster board anyway from the  
17 jury's view.

18 So that's not a problem. So I don't want  
19 you to think I'm saying they can't show any kind of  
20 emotion at all but -- Mrs. Widdick did what she  
21 should have done, if she couldn't control herself.  
22 She tried to leave the courtroom.

23 But we don't even know at this point  
24 whether Mr. Burk's going to be on the jury, so -- he  
25 is an alternate juror, and we can face that

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1 possibility later.

2 MR. WILNER: Of course.

3 THE COURT: Are you ready to proceed?

4 MR. WILNER: Ready.

5 THE COURT: Are you ready?

6 MR. NYHAN: Ready, Your Honor.

7 THE COURT: Bring them in please,

8 Mr. Backer.

9 (Side-bar conference concluded;  
10 proceedings resumed)

11 (Jury enters courtroom)

12 THE COURT: Okay. Mr. Wilner, you may  
13 proceed.

14 MR. WILNER: May it please the Court?

15 Q Dr. Feingold, I just have one more record

16 that I'd like you to share with us titled the  
17 "Expiration Summary," dated May 15th, 1997. And  
18 is this the final diagnosis or the final chapter in  
19 this story?

20 A Yes, precisely. This is the final  
21 chapter. When a patient dies in a hospital, it is  
22 necessary to prepare a review of the events, and  
23 that's called an Expiration Summary.

24 It lists the final diagnoses as the  
25 physicians who are taking care of the patient

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1 understood them to be. And it shows here that the  
2 first final diagnosis was malignant neoplasm of  
3 lung.

4 Q What does "neoplasm" mean?

5 A Neoplasm means new growth.

6 Q New in what sense?

7 A A growth that doesn't belong there, it's  
8 not supposed to be there.

9 Q Is that the same as cancer?

10 A No. Actually, there are neoplasms that  
11 are cancerous and neoplasms that are not cancerous.

12 Q Is malignant neoplasm a cancer?

13 A A malignant neoplasm is a cancerous new  
14 growth.

15 Q Why don't you just say cancer?

16 A It's more precise to say malignant  
17 neoplasm of the lung.

18 Q Respiratory failure, what does that mean?



19           A     It means because of the abnormality of the  
20     functioning of the lung, to some degree because of  
21     the underlying emphysema and to some degree because  
22     of the invasion of the lung by the cancer, by the  
23     malignant neoplasm, item number one.

24                     The party could not breathe.   And because  
25     he was deemed to be terminally ill and hopelessly

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1     ill, he was not put on a ventilator to support his  
2     breathing.   That's the right thing to do, not to put  
3     him on a ventilator.   So he died partially -- the  
4     means of his dying, the mechanism of his dying was  
5     that he couldn't breath.

6           Q     Pleural effusion?

7           A     That's the fluid that I showed on the CT  
8     scan which got worse as he got older -- as his  
9     disease progressed.

10          Q     Pneumonia?

11          A     He also had pneumonia.   This is a common  
12     complication of lung cancer.

13          Q     Chronic airway obstruction?

14          A     That's the COPD that I demonstrated.   In  
15     this case, it includes emphysema.

16          Q     Broncocytopenia?

17          A     A low platelet count, one of the  
18     components of the blood, that makes the blood clot.  
19     At this point, his platelets were destroyed by the  
20     cancer and by the therapy for the cancer, so he

21 couldn't clot his blood.

22 Q Venusthrombosis?

23 A The opposite, basically. He had both

24 inability to clot in a certain way and excess

25 clotting in another way. The venusthrombosis means

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1 he that had blot clots in the legs caused by the

2 cancer.

3 Q Deficiency anemia?

4 A The patient was anemic because of multiple

5 reasons including fact that he had cancer and he was

6 getting therapy.

7 Q And hyperplasia prostate?

8 A That was the enlargement of the prostate

9 previously identified.

10 Q And diabetes?

11 A Uncomplicated and there was some high

12 blood sugar.

13 Q And in simple term, what caused his death?

14 A The cancer of the lung.

15 Q Then does it recount the hospital course

16 and the reasons for admission?

17 A Yes. There is a recitation of exactly

18 what happened to the man.

19 Q The patient was 67-year-old white male who

20 presented in the emergency room with chief

21 complaints of chest pain and shortness of breath.

22 The patient is known stage 4, B, large cell lung

23 cancer. It is quite advanced. The patient has been

24 at home with morphine sulfate, and he states he is  
25 ready to go.

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1 Over the last couple of days, he has  
2 increasing shortness of breath, increasing chest  
3 pain in the left lower rib area and has become  
4 anxious and uncomfortable with his shortness of  
5 breath, so he requested the ambulance to bring him  
6 to the Wellington Regional Medical Center emergency  
7 room.

8 Is this typical of what happens in the  
9 last days?

10 A Yes.

11 Q And without going into detail, Mr. Maddox  
12 died on the 15th?

13 A Yes. He became increasingly anxious. The  
14 medical record states that with shortness of breath  
15 and anxiety, which is a typical event of shortness  
16 of breath, because shortness of breath creates  
17 tremendous anxiety, uncontrollable anxiety.

18 The patient was treated with additional  
19 narcotic, additional morphine to relieve his  
20 suffering, and he died. That typically does occur.  
21 The doctor's duty is to give the patient enough  
22 morphine to reduce the suffering but, in the end,  
23 that also does kill the patient.

24 Q The death certificate is in the medical  
25 records, and you have seen it?

1           A     I have.

2           Q     I can't come up with it this second just  
3 because I forgot where it was, but what does the  
4 death certificate say about the cause of death?

5           A     Lung cancer.

6           Q     And we'll pull out the death certificate  
7 when we find it, but I want to move on to something  
8 else. It's -- one of the issues in this case is  
9 whether cigarette smoking was a cause of  
10 Mr. Maddox's death. So have you been asked to  
11 consider that?

12          A     Yes.

13          Q     All right. In considering whether  
14 cigarette smoking was a cause of Mr. Maddox's death  
15 though -- I apologize if this seems  
16 oversimplified -- do you have some way of  
17 evaluating, some standard procedure that you use?

18          A     Yes. It's actually not simple at all.  
19 It's sort of profound.

20          Q     Okay. Well, let's say what procedure do  
21 you use, what conclusions, and we'll go through it  
22 real quick.

23          A     Well, an individual case, what I do, what  
24 doctors do, is to think about the illness and to  
25 think about what could have caused it. I mean, you

1 can go from complicated things to simple things and  
2 look in the same framework.

3 In a patient who dies of cancer, the  
4 question is, was the patient exposed to a known  
5 carcinogen, meaning a substance that is known to  
6 cause cancer in humans and animals.

7 Q Okay.

8 A So that's the question: Was the patient  
9 exposed to a known carcinogen.

10 Q Was Mr. Maddox?

11 A He was.

12 Q Okay. Number two.

13 A Then the question is, was the patient  
14 exposed to a known carcinogen in a sufficient dose  
15 to cause the disease.

16 Q Enough of it?

17 A Enough of it.

18 Q Now, what -- well, let me go back to  
19 this. What known carcinogen or carcinogens was  
20 Mr. Maddox exposed to?

21 A I should say that cigarette smoke,  
22 mainstream smoke contains some 4- to 500 volatile or  
23 vapor phase element, and about 3500 particulate  
24 elements. So in a puff of smoke, they're actually  
25 about 4,000 different compounds.

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1 Q Without going into detail, because we've

2 heard some of that before, I just want to make sure  
3 what is the carcinogen you're talking about. If  
4 it's obvious --

5 A There are 18 known carcinogens, at least,  
6 and these include 11 polycyclic --

7 Q I don't mean to go into the chemicals.  
8 Let's just keep it simple.

9 A Okay.

10 Q What carcinogen, collectively, are we  
11 talking about?

12 A Yes. There are at least -- I'm sorry,  
13 38. I said 18, I meant 38 --

14 Q Are we talking about cigarette smoke?

15 A Yeah, they come from cigarette smoke.

16 Q All right. That's all I needed at this  
17 point.

18 A They're in the smoke.

19 Q All right. So was there anything else  
20 that you knew about in Mr. -- or anything else in  
21 any of the medical records or anything that  
22 Mr. Maddox was exposed to that was in any way  
23 comparable to the cigarette carcinogens in his life,  
24 that you know about?

25 A Nothing, nothing.

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1 Q Okay. All right. Number two, exposed to  
2 a dose sufficient to cause the disease?

3 A Yes.

4 Q What did you mean by a dose when you're

5 talking about cigarettes?

6 A How much of these 38 -- at least 38  
7 carcinogens you inhale into your body in a lifetime.

8 Q All right. So if he were to smoke from  
9 1946 up until 1996, would that be enough?

10 A Yes. It's enormously enough. It's much  
11 more than necessary.

12 Q I'm going to talk to you a little bit  
13 about that because there is another issue here about  
14 Lucky Strike versus some other smoke, so we're going  
15 to talk about that in just a second. Let me finish  
16 this real fast. Number three --

17 A The third thing is that the cancer  
18 develops in an organ that's known to be a target  
19 organ.

20 Q Target organ. Okay. Is the lung such?

21 A It's the main one. There are others in  
22 which cancer develops due to the toxins in cigarette  
23 smoke, but it is the typical target organ.

24 Q What else?

25 A After a suitable latency period. When a

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1 cancer develops after the appropriate amount of  
2 latency.

3 Q What does "latency" mean?

4 A Latency means the period of time between  
5 starting smoking and cancer developing.

6 Q And what is a suitable latency for

7 cigarette smoking to produce lung cancer?

8 A It's some years. It's certainly more than  
9 a day. It's certainly more than a month. It's  
10 almost certain -- in almost every case, it's more  
11 than 10 years. But typically, it's 20 to 50 years.

12 Q Okay.

13 A So in fact, it's more on the high end,  
14 more like 30 years, typically.

15 Q Okay. Was there anything else -- do you  
16 feel that these criteria were met?

17 A Every one.

18 Q And was Mr. Maddox's cancer within  
19 reasonable medical probability caused by cigarette  
20 smoke?

21 A I would say to almost a complete degree of  
22 medical certainty, this patient's lung cancer was  
23 caused by cigarette smoke.

24 Q All right. Now, let's focus in on one  
25 particular issue, which is this dose -- the dose

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1 issue, okay. And let me go over to here and draw  
2 another lousy diagram here that I can't draw.

3 So let's say that Mr. Maddox started  
4 smoking Chesterfields in 1946, which are not made by  
5 Brown & Williamson -- made by Liggett or American,  
6 all right. Chesterfields. Let's assume.

7 And then in 1950 or '49 or '50, whatever,  
8 he changes to Lucky Strike, which is made by  
9 American, now Brown & Williamson, okay. And he



10 smokes that. And then we'll put a mark here at '84,  
11 '85 and a question mark, so I'll ask you in  
12 different ways on that.

13 But let's just take it from '49 to '50,  
14 first, all the way up to '96 and just assume that he  
15 smoked Lucky Strikes the whole time, just for  
16 assumption and then we'll go back and ease that out  
17 if there's any evidence that he switched to some  
18 other brand partially or completely.

19 All right. The fact that he started in  
20 '49 -- actually he started smoking in 1946 with  
21 Chesterfields, he didn't start smoking Lucky Strike  
22 until 1950, how does that impact on whether Lucky  
23 Strike was a substantial contributing cause?

24 MR. NYHAN: Objection, Your Honor; no  
25 foundation for the starting period there.

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1 THE COURT: All right.

2 MR. WILNER: All right. I don't know.

3 Q Let's assume that he started in 1946 with  
4 Chesterfields, and then I'll ask you for some other  
5 year.

6 But my question is, under this assumption,  
7 he starts in '46 with Chesterfield, switches to  
8 Lucky Strike in '49 to '50, and then smokes to '96;  
9 is Lucky Strike a substantial contributing cause?

10 A Absolutely.

11 Q All right. Now, let's change the

12 hypothetical a little bit and say that he started  
13 with Chesterfields in 1948; does that change  
14 anything?  
15 A No.  
16 Q All right. Let's change the hypothetical  
17 again and say that since there evidently is some  
18 witness that says he smoked Marlboro Lights at least  
19 part of the time, in this period from '84, '85 to  
20 1966 (sic), let's say that he smoked nothing but  
21 Marlboro Lights for this period, just for instance.  
22 Let's say that this is all Marlboro, regardless of  
23 whether it's true or false, let's just assume. My  
24 question to you -- I don't know if you can see this  
25 chicken scratch or not.

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1 A I can see it.  
2 Q It -- would the smoking of Lucky Strike  
3 from, let's say, 1949 or 1950 up until 1984 and '85,  
4 even if we assume that it was all Marlboro after  
5 that, is that a substantial contributing cause of  
6 his death?  
7 A To a reasonable degree of medical  
8 certainty?  
9 Q Yeah.  
10 A 100 percent.  
11 Q Why do you say that?  
12 A Because cancer doesn't form on one day.  
13 Cancer is a process that develops, actually,  
14 probably from the first puff of a cigarette.

15                   Cancer cells develop and involve DNA  
16 changes. Some of the DNA changes are fixed; some of  
17 the DNA changes have to be augmented by other  
18 events. It's a process.

19                   And if a person smokes Lucky Strike  
20 cigarettes from 1950 to 1986, that's a huge dose  
21 which has created a huge number of cells, which are  
22 ready to transform into active, invading malignancy.

23                   So without any question at all, that is a  
24 potent and important contributor to what happened to  
25 the patient.

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1           Q     Now, let's assume that, for legal reasons,  
2 we wanted to confine our question to a period before  
3 1970, between 1950 and 1970, 20 years of Lucky  
4 Strike. Just for a hypothetical -- ignore this  
5 or -- assume that this smoking out here never  
6 happened or it was another brand or whatever, and  
7 you just had from '50 to '70 with Lucky Strike, is  
8 20 years a substantial contributing cause?

9           A     Twenty years of smoking one pack a day, at  
10 least, and probably two, often, so we're talking  
11 about 20- to arguably 40-pack years is an enormously  
12 potent effect, and without any medical question at  
13 all contributed to or would have contributed to this  
14 man's development of lung cancer.

15           Q     Does that mean that the smoking, if it  
16 occurred from 1970 to 1996, would have no role?

17           A     Oh, no. It has an important role also,  
18 but you asked me if the smoking from '50 to '70 was  
19 a contributor, and I said it was a potent  
20 contributor.

21           Q     Is it possible scientifically to break  
22 down this time scale here and segregate out exactly  
23 which -- I don't know how to ask this.

24                     I'll try general. If you -- how do you  
25 tell what's contributory; do you understand my

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1 question?

2           A     Sure.

3           Q     Okay. Well, what if I said one year or  
4 ten years. How do you answer the question of what  
5 is a substantial contributing cause to a cancer?

6           A     Well, I think a reasonable doctor answers  
7 the question by saying an exposure that's not  
8 trivial. An exposure which is significant and an  
9 exposure which is more than a puff and more than a  
10 day, is not a trivial exposure.

11                     An exposure which is like every day, 20 or  
12 30 or 40 cigarettes every day for 20 years is hardly  
13 trivial. For one year, it's certainly not trivial.

14           Q     Can there be more than one cause of the  
15 cancer?

16           A     Well, there was more than one cigarette  
17 that caused this man's cancer. It was the totality  
18 of cigarettes that caused this man's lung cancer.

19           Q     And you said any nontrivial -- did you say

20 any nontrivial exposure you would consider a  
21 contributing cause?  
22 A Exactly. I think that if it's a  
23 nontrivial exposure, I think, from a doctor's point  
24 of view -- my opinion, my understanding of this  
25 disease, is that an exposure which is nontrivial is

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1 an important contributor.

2 Q What's the definition of nontrivial?

3 A To some extent, it's based on my opinion,  
4 my knowledge, my training, my experience. But I  
5 don't know the minimum time. If it's less than a  
6 year, it's nontrivial.

7 Q Less than a year --

8 A Of smoking one pack a day is not a trivial  
9 exposure. I don't know the minimum. What's the  
10 smallest number of nontrivial? I'm not sure.

11 Q So in case I wasn't clear, was the period  
12 from 1950 to 1970 a substantial contributing cause,  
13 in your opinion, if you restricted yourself only to  
14 that period for whatever that reason?

15 A That's an easy question. That is  
16 absolutely it was contributory, a substantial  
17 contributor to what happened to this patient. There  
18 were not -- we're really not worried about what's  
19 trivial and not trivial. This is a huge exposure,  
20 and it contributed in a very important way.

21 Q Does cigarette smoke cause permanent

22 injury?

23 A Absolutely.

24 Q Does it cause injury that's irreversible?

25 A In the DNA of cells, an inside blueprint

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1 of the cells, absolutely.

2 Q Does it cause it early on when you begin  
3 to smoke?

4 A Probably from the first puff, which is a  
5 scary thought, but certainly for a number of years.

6 Q Why doesn't everybody get cancer?

7 A Fortunately, our cells have mechanisms to  
8 repair damage or to hold damage in check. Not all  
9 cells that are altered with a DNA alteration that  
10 can lead to cancer actually go on to lead to cancer,  
11 thank God. But there'd be no people, if they did.

12 But the point is, it requires more than  
13 one hit, you know, more than one Lucky Strike to  
14 knock the ball out of the stadium and you get  
15 invasive cancer.

16 Q Is it likely or not that Mr. Maddox had  
17 cancerous changes beginning in his early years, from  
18 the '40s and into the '50s?

19 MR. NYHAN: Objection; vague.

20 A We have an understanding it is.

21 THE COURT: I'm sorry?

22 MR. NYHAN: Objection; vague.

23 THE COURT: I'll allow it over the  
24 objection, if he can answer it.

25           A     If I understand correctly, the question

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1    is, is it likely that there were precancerous or  
2    malignant-type transformations in the cells in this  
3    patient early on, for example --

4           Q     Yes.

5           A     -- I don't know, say from 1946 to 1950,  
6    that would be early on, from 1950 to 1960. And my  
7    answer is that what we understand today about the  
8    way cancer is formed, for sure he had DNA changes,  
9    absolutely had DNA changes, say, in 1960.

10          Q     Doctor, was Mr. Maddox's cancer a  
11    preventable disease?

12          A     Yes, it was.

13          Q     Back before 1946, was there information  
14    known to the cigarette industry and American Tobacco  
15    that cigarettes could cause this situation, this  
16    condition, this disease?

17          A     Yes, of course there was.

18          Q     Have you been asked to evaluate how the  
19    scientists had researched the issue and information  
20    that was available to American Tobacco?

21          A     Yes.

22          Q     And Brown & Williamson?

23          A     Yes.

24          Q     All right. I'd like to ask you a few  
25    questions, and we're going to move it along as fast

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1 as we can get the court reporter to take it down.

2 Would you look --

3 MS. HARTLEY: Let me get the other copies.

4 MR. WILNER: Thanks. I think the History  
5 is there. Let's get the evidence copy. Thank you,  
6 thank you.

7 MR. NYHAN: Which exhibit?

8 MR. WILNER: This is Exhibit 6.

9 Q Dr. Feingold, you have a big book on your  
10 counter there.

11 A I do.

12 Q What is it?

13 A It's my personal collection of the core of  
14 the medical journal articles that have been  
15 published this century regarding cigarette smoking  
16 and lung cancer.

17 Q Where did you get it?

18 A I put it together myself.

19 Q And you have flags all over it. Have you  
20 considered -- have you read through that to consider  
21 when this all was known or should have been known?

22 A My flags, it's my habit, you know, put  
23 flags and highlighting and things. But, yeah, I've  
24 read this -- I've studied it. It's not fair to say  
25 "read." I've studied it and studied it and studied



1 it.

2 Q All right. Let me hand you what's been  
3 marked as Plaintiff's Exhibit 6 with the term  
4 "History" on it; are you familiar with that?

5 A Well, I immediately see that many of the  
6 articles that are here, for example, article No. 10,  
7 I have my book opened to article No. 10, are the  
8 same articles.

9 I should point out that some of these  
10 articles you gave to me and some of these articles I  
11 got from other sources. But my work on this is my  
12 work.

13 Q My question is, yours looks a little  
14 fatter than that one; why is that?

15 A I've got a lot more. This is just a core  
16 of the articles, and I've got others.

17 Q All right. Well, let's go back then --  
18 and you can use either one -- yours is already  
19 highlighted?

20 A I'd prefer to use mine.

21 Q Okay. So I'll take the evidence copy  
22 back. Incidentally, is yours tabbed with the same  
23 numbers as this?

24 A I hope so.

25 Q I do, too. Okay. When do you date the

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1 first reliable information, study, that the -- that  
2 cigarettes were likely to cause lung cancer?

3           A     The first study that was published was  
4 published in 1941. It was actually presented to the  
5 International Cancer Congress in Atlantic City on  
6 September 13th, 1939. So it was no secret, it was  
7 public knowledge. But it was published in an  
8 important journal called The Archives of Surgery in  
9 1941.

10          Q     And who published it?

11          A     Two doctors would end up being very  
12 famous. One, Dr. Alton Ochsner, the Ochsner Clinic  
13 in New Orleans is named after him; and the other is  
14 Dr. Michael DeBakey, world famous --

15               MR. NYHAN: Your Honor, could I be seen at  
16 side bar?

17               (Side-bar conference held outside the  
18 hearing of the jury)

19               MR. NYHAN: I want -- I'd like to know how  
20 much of this, these excerpts of these publications,  
21 the Criminal Negligence of the Cigarette Industry  
22 that Mr. Wilner has given you, I want to be sure  
23 that none of his argumentative material is shown on  
24 the screen to the jury.

25               He doesn't identify the page for me before

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1 we get it up, so I have to -- I'd like not to have  
2 to make a series of objections.

3               MR. WILNER: That's fine, I'll tell you  
4 the page.

5               MR. NYHAN: And many of these things have

6 argumentative headlines written in them, and I think  
7 it would be prejudicial if he's using these  
8 headlines. I don't mind him using visual aids, but  
9 I think it's inappropriate to intersperse his  
10 arguments on the vision aids, and I see that as a  
11 potential problem. So you need to speak with the  
12 operator --

13 MR. WILNER: All we're doing is putting up  
14 the quotes and the pictures of the people.

15 MR. NYHAN: If we can limit it to that and  
16 avoid the other stuff, I don't think there is a  
17 problem.

18 MR. WILNER: Okay.

19 THE COURT: Woody, I'm obviously not ready  
20 to break for lunch yet, but I'll just defer to you  
21 when you get to a point when you think you're going  
22 to change gears, between 12:00 and 12:30, just do  
23 it.

24 MR. WILNER: Fine.

25 (Side-bar conference concluded;

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1 proceedings resumed before the jury)

2 Q All right. Dr. Feingold, 1941, is this a  
3 picture of Dr. Alton Ochsner?

4 A Yes.

5 Q This was not -- I guess this was later in  
6 his life or something?

7 A Yes. He was a young man in 1941.

8 Q And Dr. DeBakey?  
9 A Michael DeBakey.  
10 Q He's still alive?  
11 A He is, still operating.  
12 Q And were these two physicians, even back  
13 in 1941, well known?  
14 A Yes. They were surgeons actually.  
15 Q Surgeons. And what was the significance  
16 of the 1941 article by Ochsner and DeBakey?  
17 A I think it was very significant. First of  
18 all, understand that this was presented at a big  
19 conference in Atlantic City and then published in a  
20 very important medical journal, The Archives of  
21 Surgery and, secondly, this article was a huge  
22 undertaking. It was a meticulous labor,  
23 intellectual labor, where all possible explanations  
24 for the newly detected rise in lung cancer were  
25 considered by Ochsner and DeBakey.

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1 The conclusion that these two surgeons  
2 came to -- and recognize that they were operating on  
3 lung cancer patients -- the conclusion that they  
4 came to was that it is -- and it is shown on the  
5 board there actually. That it is our definite  
6 conviction that the increase in the incidence of  
7 pulmonary carcinoma is due largely to the increase  
8 in smoking, particularly cigarette smoking, which is  
9 universally associated with inhalation. Every --  
10 Q Go ahead.

11           A     There was one more sentence that is pretty  
12 important. Every one of our patients, with the  
13 exception of two women, was an extensive smoker.

14           Q     Now, in evaluating any piece of work that  
15 appears in the medical journals, is the level and  
16 the depth of scholarship important?

17           A     Of course it's important. It's very  
18 important.

19           Q     All right. And have you looked at this  
20 paper by Ochsner and DeBakey, I think it's tab --

21           A     10.

22           Q     It is tab 10 of Exhibit 6, plaintiff's  
23 exhibits on medical history?

24           A     Yes.

25           Q     And do you have it there?

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1           A     I have it before me.

2           Q     Okay. I've pulled out the evidence copy,  
3 and it looks like, to me, it runs from page 209 all  
4 the way up through to 258, about 50 pages of  
5 medicine?

6           A     Correct. And of those 50 pages, I would  
7 point out that the number of citations in the  
8 bibliography and each and every one of the citations  
9 is discussed in this paper. The citations go from  
10 page 242 to page 258.

11                   (Change of reporters, 11:25 a.m.)

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1           Q     And when you say citations, you mean,  
2     what, bibliography?

3           A     Bibliography, yes, all these articles that  
4     the doctors read and studied and considered and  
5     discussed in their paper in preparing this document.

6           Q     Now, when -- when doctors and scientists  
7     write, what is the importance of citing to other  
8     work?

9           A     Proof.

10          Q     Is -- do you view an article -- a journal,  
11     where a doctor says, I just believe this or I just  
12     believe that without a citation of authority an  
13     experiment or something like that?

14          A     No. The way it works is, you -- you --  
15     people's opinions in medicine and science, where the

16 stakes are real high, people's opinions have to be  
17 truthful and proven and you have to be able to prove  
18 your opinions to yourself and to everybody else.

19           So it's not enough to say, oh, I think  
20 this or that. You have to say, I think it because  
21 either I did this experiment, a series of  
22 experiments and here is exactly how I did it so you  
23 can reproduce the experiment if you want to.

24           I did it. Here's my full disclosure on  
25 what I did, how I did it, go and do it again. This

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1 is what I found and this is what I think and/or here  
2 is what all these other people did, because there's  
3 -- science evolves, it's a growth. Here's what all  
4 these other people did.

5           I carefully, in a scholarly way, studied  
6 all these things that the other people did. I  
7 thought about all their experiments, all their  
8 opinions, I've written them down and put them  
9 together with a certain series of thoughts, here are  
10 the citations, the bibliography, here is my proof, I  
11 thought about it and here is what they thought and  
12 here is what I thought.

13       Q     And now -- and so in 1941, was that -- that  
14 was before copy machines, faxes and computers?

15       A     Right.

16       Q     And did Ochsner and DeBakey methodically  
17 review the medical literature on lung cancer?

18           A     Well, the paper itself, the body of the  
19 paper itself demonstrates a careful methodical,  
20 meticulous consideration of each and every part.

21           Q     Do they look at international papers in  
22 different languages?

23           A     In different languages, absolutely. Some  
24 of which I even went and tried to read.

25           Q     Did -- is there another comparable paper to

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1 Ochsner and DeBakey in the 1940s in terms of its  
2 depth of scholarship?

3           A     No, nothing like that.

4           Q     Would this establish Drs. Ochsner and  
5 DeBakey as preeminent authorities in the field of  
6 lung diseases and especially lung cancer?

7           A     At that time, absolutely.

8           Q     And let's take a look at one citation  
9 here.

10                   The -- just one second. Oh, do you see  
11 this name, Roffo, Roffo?

12           A     Sure.

13           Q     Who is Dr. Roffo?

14           A     Dr. Roffo was a scientist who did animal  
15 research. I think he was actually Brazilian, if I'm  
16 not mistaken. He wrote in Portuguese and French and  
17 English.

18           Q     Did Dr. Ochsner cite Dr. Roffo?

19           A     In his various languages, yes.

20           Q     Was Dr. Roffo working with tobacco tar and



21 seeing whether he could get cancer on laboratory  
22 animals?  
23 A He did.  
24 Q And did he do a series of experiments down  
25 in Venezuela, and where?

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1 A In Brazil.  
2 Q Brazil, yes. To see what was happening?  
3 A Yes. In fact, Roffo's experiments are  
4 discussed beginning on page 220, and if you turn to  
5 page 220 you'll see his epidemiological  
6 considerations and his rabbit studies with tobacco  
7 tar. There it is.  
8 Q Did Roffo -- let's be completely fair about  
9 it. Did Roffo -- when did Roffo write?  
10 A He was writing in the 1930s. I can give  
11 you the exact dates.  
12 Q Well, just leave it at that.  
13 Did he prove that -- that cigarette smoke  
14 caused cancer?  
15 A Yes.  
16 Q Did the -- was he cited by Dr. Ochsner?  
17 A Well, what Drs. Ochsner and DeBakey said  
18 specifically was -- Roffo stated the conviction and  
19 when he says "stated" he doesn't mean he was talking  
20 to him on the telephone, he was talking about his  
21 articles, stated the conviction on the basis of his  
22 clinical observations of 78,000 patients treated at

23 the University Institute for Experimental Medicine  
24 and For the Study of the Treatment of Cancer in  
25 Buenos Aires, the tobacco is the most important

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1 factor in determining the localization of cancer.

2 And he goes on to talk about -- in the  
3 middle of the page, experimental promotion of tumors  
4 in rabbits with tar obtained from black debauchy  
5 tobacco is as easy as with coal tar. With both of  
6 these substances, when the tar was applied or the  
7 substance applied to the ear of a rabbit, a tumor  
8 developed in 100 percent of cases.

9 Q Now, holding that thought for a minute,  
10 did you -- were you able to find in -- in any  
11 documentation, that Brown & Williamson was aware of  
12 Roffo's work in the early 1950s?

13 A Oh, yes.

14 Q And did Brown & Williamson show that they  
15 had read the Roffo's publications about -- that were  
16 occurring down in Brazil?

17 A Yes, they did. In fact, in 1952, let's see  
18 now, this is actually from the Brown & Williamson  
19 Can. Book, Tab 1. It says report of progress. This  
20 is dated 12/24/52.

21 Q Hold on, we are not going to be able to  
22 read it.

23 MS. HARTLEY: It's in evidence. It's in  
24 Can. One.

25 MR. WILNER: No, it's not.

1 THE WITNESS: B&W Can.

2 Q It's not in evidence yet, so you can't tell  
3 us what the document says. So just answer generally,  
4 because we will come back to it.

5 A They knew it. They knew all about Roffo.

6 Q All right. So let me go in. And I'm not  
7 going to belabor this. But Ochsner and DeBakey,  
8 1941, their -- was their conclusion -- what did their  
9 conclusion have to do with the rise of lung cancer?

10 A Well, that's a different topic. Now we're  
11 leaving the animal issue.

12 Q All right. I didn't mean to get -- get  
13 that far ahead. Let's see if I can -- if I can move  
14 it along.

15 What was the significance of Ochsner and  
16 DeBakey in 1941 on the question of cigarettes and  
17 their hazard for lung cancer?

18 A What they said was that it is our definite  
19 conviction that the increase of the instance of  
20 pulmonary carcinoma is due to the increase in  
21 smoking.

22 Then they give this whole series of reasons  
23 why that was. If you look at, at -- at animal  
24 studies, it helps to explain biologically why  
25 something was observed, with statistics. And there

1 also is an issue of dose. So on that same page, if  
2 you look just a little bit down, on that same page.

3 Q Which page?

4 A It's page 220.

5 (Mr. Wilner confers with Ms. Hartley)

6 MR. WILNER: You're doing fine. Just a  
7 minute, let's pick up our stuff. Oh, dear. It's all  
8 right, it happens once at trial. It's all right. I  
9 know, we will get to that.

10 Q So where were we before we dropped all that  
11 stuff?

12 A Well, this is very important. If you  
13 look --

14 Q What page?

15 A 220.

16 Q The page that's on the overhead.

17 A Right, just after the Roffo discussion.

18 Look down where Hoffman, from the  
19 statistical investigations, concluded that smoking  
20 probably plays a definite etiologic role.

21 Q What does etiologic mean?

22 A Cause. In a subsequent article, Hoffman  
23 stated they, meaning statistics, undoubtedly are  
24 indicative of the greater liability to certain forms  
25 of cancer among those who have acquired heavy smoking

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1 habits than among those who indulge normally.

2                   Personally, I am strongly of the opinion  
3   that a relation between the increase of smoking  
4   habits and cancer of the lung may be safely assumed  
5   to exist.

6           Q     Now, all right, let me play the Devil's  
7   advocate. Just because Hoffman said it, does that  
8   mean it was so?

9           A     Of course not.

10          Q     Okay.

11          A     But he was talking about statistics and he  
12   was talking about references. And this is in Ochsner  
13   and DeBakey's paper, which is towards the end,  
14   actually. They've gone through a lot of other  
15   reasons and they've just looked at animal research,  
16   which helps to prove the point, because the biology  
17   -- the animal studies are consistent.

18                   They are not against the observation that  
19   there's something that causes cancer in tobacco  
20   smoke. They're in favor of the observation. They  
21   helped prove it.

22          Q     All right. Now, let's first focus, let me  
23   lead you, for just a second, to the paragraph to --  
24   in Ochsner and DeBakey, 1941, that we, that we had  
25   started with and then I'm going to ask you about

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1   this. And the jury has seen this already, so we are  
2   not going to go over it.

3                   It's our definite conviction that the

4 increase in incidence of pulmonary carcinoma is due  
5 largely to the increase in smoking, particularly  
6 cigarette smoking, which is universally associated  
7 with inhalation. You remember that?

8 A Of course.

9 Q Now, was this the chart they were looking,  
10 well --

11 A No, the chart they were looking at was on  
12 page 212 of their own article.

13 Q Okay. Just so it's not confusing.

14 A I mean, it's the same chart. It's just  
15 that that chart starts from 1900 and goes to --

16 Q This is 1930. I know you can't see.

17 A I can't.

18 Q Let me just clear this up. This is 1930  
19 and this is 1941?

20 A Right.

21 Q On this little thing, so -- or this is  
22 1940, that's 1930. So when Ochsner and DeBakey  
23 talked about the increase, how much increase were  
24 they seeing compared to what happened after they  
25 wrote?

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1 A They were seeing just the first part of it,  
2 just a -- the first little blip of it. But it was  
3 enough to predict the rest of the rise because, you  
4 see, the rest of the rise is just on that curve.

5 Q Well, why would that matter? I mean, just  
6 going from there to there doesn't look like that big

7 of a deal.

8 A Oh, it sure is. Look at page 212 of their  
9 report.

10 Q What does it say?

11 A Bingo.

12 Q What does it say? Oh, okay. What is  
13 this? This is from 1920 to 1936, right?

14 A Right.

15 Q So this is a little window much more  
16 detailed than the one we saw just a second ago?

17 A Well, it's shorter because, you know, we've  
18 only gone till this period of time.

19 Q Okay. And what is this? It says actual  
20 number of deaths. This is from what?

21 A Lung cancer.

22 Q All right. Is that up here, pulmonary  
23 carcinoma?

24 A As you can see, a graphic representation of  
25 mortality from cancer of the lung.

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1 Q Cancer of the lung. I say again, so what?  
2 So what?

3 A So what?

4 Q Yes.

5 A The point was, prior to about 1920, there  
6 was very, very little lung cancer. There was almost  
7 no lung cancer anywhere in the world.

8 When they -- when Ochsner and DeBakey saw

9     this increase in lung cancer, they knew that  
10    something very strange happened.

11               And, you know, it's interesting because  
12    when -- when a disease is uncommon, like lung cancer  
13    was very, very uncommon in the beginning of the  
14    century and in the last century -- there was very  
15    little lung cancer, almost none.

16               When a disease is uncommon and something is  
17    introduced into the environment that greatly  
18    increases the likelihood that the disease occurs,  
19    causes the disease, it's easy to detect the  
20    difference.

21               See, diseases that are common for other  
22    reasons are hard to detect an increase because  
23    there's already 100,000 cases of a certain illness  
24    like, say, a cold. It's hard to detect if there's  
25    now 150,000 cases. There are already 100,000, so

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1    it's hard to tell a difference.

2               But if there are no lung cancers and  
3    now all of a sudden you see in the country a few  
4    thousand, something has really happened. And that's  
5    what this is.

6               Q     And did they go through and -- with all  
7    these citations and try to analyze what it was that  
8    was causing this problem?

9               A     They analyzed it meticulously and very,  
10   very importantly they said that this is the cause --  
11   obviously, if this is the cause, cigarette smoking,



12 cigarette smoke is the cause of lung cancer, this  
13 new epidemic, then something had to be done,  
14 otherwise the rest of the curve that we eventually  
15 see would occur.

16           So, in other words, simply stated, by 1941,  
17 the epidemic that we are in the midst of was  
18 preventable.

19           Q     Was that -- did they consider things like  
20 air pollution?

21           A     They certainly did.

22           Q     Tarring of the streets and highways with  
23 tar?

24           A     Oh, there was a whole thing about tar. You  
25 know, in the middle of the century a lot of the roads

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1 weren't tarred. It's hard to remember. It was  
2 really between like about the 1930s or 1950s that the  
3 roads were tarred widely.

4           The -- so there was a concern, especially  
5 in other countries, with whether or not this tarring,  
6 this new business of tarring the roads was causing  
7 lung cancer.

8           But in multiple articles of the era,  
9 numerous articles of the era, it was demonstrated  
10 that the tarring of the roads, this new fashion of  
11 tarring the roads could not be the cause.

12           For example, and Ochsner and DeBakey said  
13 it, they pointed out to it very clearly. They said,

14 Look at Great -- look at Russia, look at the Soviet  
15 Union. First of all, there are no cars, because we  
16 are talking 1941. There were practically no cars in  
17 the Soviet Union, except a few. And secondly, there  
18 was no tar in the roads.

19 They didn't have any tar in the roads and  
20 they had an increase in lung cancer that was just  
21 like UK, United Kingdom, and just like America. So  
22 it couldn't be the tarring of the roads. And there  
23 were other countries similarly that tarring clearly  
24 was not the issue.

25 So Ochsner and DeBakey dismissed tarring of

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1 the roads as an impossibility.

2 Q 1941, we descended to World War II, right?

3 A Well, we were already in it actually. The  
4 war has started.

5 Q Right, the war starts. And when is the --  
6 is the next time that there is a serious paper that  
7 -- worthy of international attention on the subject  
8 of lung cancer?

9 A Well, the very -- there are other papers,  
10 but the next big thing, the huge event, in my  
11 opinion, one of the most important single articles  
12 that was ever published in the medical literature,  
13 certainly this century, was published as a lead  
14 article in the Journal of the American Medical  
15 Association on January 27, 1950.

16 Q And who -- who made that publication?

17           A     Well, that article was written by two  
18 doctors. One's name was -- was Ernst Wynder,  
19 W-y-n-d-e-r, and the other was Dr. Evarts Graham.  
20 And there's an interesting link between Graham and  
21 the Ochsner and DeBakey paper.

22           Q     What is the story of Dr. Graham?

23           A     Well, Dr. Graham was, at that time, the  
24 most famous lung surgeon, chest surgeon, in the  
25 United States. He was the first person who, in 1933,

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1     successfully performed a lung operation to remove the  
2 lung of a cancer patient.

3                     Actually, the cancer patient was a doctor.  
4 So in 1933, he, Evarts Graham, had successfully  
5 treated a lung cancer case with surgery. And we say  
6 successfully because the patient didn't die of the  
7 operation.

8           Q     Yes, go ahead. So this guy was an  
9 important guy in -- in, you know, U.S. medicine?

10          A     Thoracic surgeon.

11          Q     Thoracic surgeon.

12          A     And also he was public. He had publicly  
13 spoken against this theory that -- that Ochsner, his  
14 student, had proposed.

15          Q     Let me get this straight. He was -- was he  
16 kind of like the dean?

17          A     He was.

18          Q     He was the first doctor to make an

19 operation and remove a lung and the patient survived?  
20 A No, the first doctor to remove a lung of a  
21 lung cancer patient and the patient survived.  
22 Q That was like in the '30s?  
23 A '33.  
24 Q And he was well-known in the medical  
25 community?

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1 A He was a professor. He was a professor of  
2 surgery in St. Louis, Missouri.  
3 Q Was -- and Dr. Ochsner was actually younger  
4 than he and was his student?  
5 A Correct.  
6 Q So Dr. Ochsner in 1941, and other dates,  
7 begins to say, or says cigarette smoking is the cause  
8 of this increase in lung cancer?  
9 A Correct.  
10 Q And what does Dr. Graham say prior to 1950?  
11 A Publicly?  
12 Q Publicly.  
13 A It's not. It's ridiculous.  
14 Q Ridiculous. So what happens in 1950?  
15 A Well, there's this medical student. His  
16 name is Ernst Wynder and he becomes interested in  
17 lung cancer. That's him.  
18 Q That's him later. And we made the joke  
19 earlier that it looks like he has a cigarette and a  
20 drink.  
21 A I think it's actually a beaker and a test

22 tube.

23 Q Well, who is Ernst Wynder?

24 A Ernst Wynder was the -- a young man,  
25 immigrant to this country, who was a medical

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1 student. And he had the temerity to approach Evarts  
2 Graham, after asking for permission from his  
3 professor.

4 And he wanted to study Evarts Graham's  
5 cases because, remember, Evarts Graham is a really  
6 famous surgeon who is operating on lung cancer  
7 patients. He's the first one to operate on somebody  
8 who survives. So people come to him from all over  
9 the country to have their lung surgery done for lung  
10 cancer.

11 So Evarts Graham has a whole collection of  
12 cases. Wynder, who is a medical student in the same  
13 city, goes to Evarts Graham and says, I want  
14 permission to review your cases and to see which ones  
15 of your patients were cigarette smokers and which  
16 ones were not.

17 Q All right. So is this -- in this kind of  
18 study, were they just trying to explain the increase  
19 or were they actually looking at people and seeing  
20 whether the -- whether the actual people who got the  
21 cancer were the same ones that smoked?

22 A They were looking at the actual people  
23 themselves.

24 Q Was this called epidemiology?

25 A Yes. This was what is called a case

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1 controlled retrospective study.

2 Q Was it a legitimate thing to do?

3 A Oh, yes. It's science.

4 Q So, and we will talk in a minute about  
5 exactly -- well, let's go ahead and do it now, but  
6 not too long.

7 A Okay.

8 Q What, what was found here in general?

9 A In general, what was found was that  
10 virtually all of the patients who Evarts Graham had  
11 treated for lung cancer and other patients who Wynder  
12 eventually went on to look at with Graham, almost all  
13 of the patients with lung cancer were cigarette  
14 smokers, almost every one of them. And that is --  
15 that's a plate that I prepared.

16 Q All right. You made a plate. You made it  
17 from this article that appears at 17, Exhibit 6, in  
18 evidence, right?

19 A Yes.

20 Q And, and explain this real quick.

21 A Well, on the right-hand side there are  
22 the smokers; on the left-hand side there are the  
23 nonsmokers. Meaning, the two bars on each side are  
24 two different kinds of people.

25 If you look on the right-hand side to begin

1 with, you see the red bar are the smokers who got  
2 lung cancer. The blue bar are the smokers who didn't  
3 get lung cancer. Now, look at the nonsmokers; there  
4 aren't any lung cancer cases there.

5 See, all of the lung cancer cases were in  
6 smokers. Of course, there were smokers who didn't  
7 get lung cancer because so many people smoked. But  
8 there was a huge difference between the likelihood of  
9 having been a smoker, if you had lung cancer. If you  
10 had lung cancer, the chances were a lot greater when  
11 you are a smoker than if you were not a smoker.

12 Look at -- concentrate on -- it's actually  
13 difficult to understand. This is something defined  
14 as odds ratios. It's a statistical concept. It's  
15 not so easy to see. Let me attempt to explain it  
16 again.

17 The point is that there were smokers and  
18 nonsmokers. Some of the nonsmokers got lung cancer,  
19 very few, extremely few. Almost all of the people  
20 who got lung cancer were smokers. Now, of course,  
21 some of the smokers didn't get lung cancer. They got  
22 away with it.

23 Q All right. Now, was this an additional  
24 point from the two -- from the point that Dr. --  
25 Drs. Ochsner and DeBakey had, had raised, in that

1 there was a parallelism between the amount of  
2 cigarette smoke -- I can't do it much, I'm sorry.

3 Between the amount of cigarettes consumed  
4 and the amount of lung cancer?

5 A Yes. This explains -- this paper by Wynder  
6 or Graham, and I should point out that this was the  
7 lead article on May 27, 1950, in Journal -- Journal  
8 of the American Medical Association. This paper  
9 explains that increase.

10 Q All right. But is it -- and is it a  
11 separate observation? Other than the parallelism, is  
12 this something new?

13 A It's another piece of proof. And basically  
14 it is strong, strong evidence that lung cancer is  
15 caused by cigarette smoking.

16 Q Did -- was this particular piece of  
17 evidence ever refuted, found to be wrong?

18 A No, it was never refuted. It was only  
19 duplicated enumerable times and then additional, even  
20 more complex, epidemiological studies were  
21 subsequently done beginning in about 1951.

22 But this kind of study, this retrospective  
23 case controlled study defined by odds ratios, this  
24 was repeated numerous, numerous times.

25 Q All right. Now, let me ask you this in

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1 terms of kind of a figure of speech. What I -- what  
2 I want to know is if -- if a cigarette manufacturer



3 had come to you in 1950, with your knowledge of  
4 medicine, I'll -- I'm trying to get you to put this  
5 in context.

6 A I would be a 1950 doctor.

7 Q You would be a 1950 doctor, who had -- who  
8 kept up with the medical literature. Let's say they  
9 had come to you and had said, I would -- we would  
10 like you to advise us. What is the state of the  
11 medical literature today? It's now, you know,  
12 whatever date, 1950. Because we do what we do and  
13 we're -- you know, it's our obligation to do this,  
14 whatever, and we want to come ask you, Dr. Feingold,  
15 back in time.

16 Tell us what the significance of this work  
17 -- mind you, only Ochsner and DeBakey and only Wynder  
18 and Graham, 1950. What's the message?

19 A The message is that we have a serious  
20 problem here.

21 Q Okay. And, in one sentence, why do we have  
22 a serious problem?

23 A Because it looks like a product that we're  
24 making is causing a hopelessly fatal lung cancer.

25 Q What if I say, but, Doctor, there are many

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1 doctors who don't -- who don't agree. How can you  
2 tell us we have got a problem?

3 A Well, in 1950, I would say, first of all,  
4 the most complete definite, exhaustive review of

5 everybody -- about everybody's thoughts, could put  
6 their thoughts down on paper and legitimize their  
7 thoughts with experiments or, you know, carefully  
8 considered opinions, all of those thoughts reviewed  
9 by these people, Ochsner and DeBakey in 1941, nine  
10 years having gone by and, look at this, the most  
11 important chest surgeon in the United States, who  
12 used to say that cigarette smoking was not the cause  
13 of lung cancer, and who smokes himself, publishes  
14 this thing and it says that lung cancer is caused by  
15 cigarette smoking. We have a problem because it's  
16 probably true.

17 Q What happened to Dr. Graham?

18 A What happened to Dr. Graham? Well,  
19 Dr. Evarts Graham went on to do more research. He  
20 went on to do some -- for some years, some additional  
21 very important research.

22 But I know exactly what happened to  
23 Dr. Graham, because Dr. Ochsner wrote what happened  
24 to Dr. Graham.

25 Q What happened to Dr. Graham?

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1 A Well, Dr. Graham cut back on his smoking of  
2 cigarettes, because Dr. Graham was a heavy cigarette  
3 smoker before he worked with this --

4 MR. NYHAN: Your Honor, objection.

5 THE COURT: I'll sustain the objection.

6 MR. WILNER: Okay.

7 THE COURT: I think you asked it in the

8 context -- I don't know what context you asked it  
9 in.

10 MR. WILNER: I don't know what the  
11 objection is, Your Honor.

12 THE COURT: Him personally or --

13 MR. WILNER: No, professionally. I'll ask  
14 it that way.

15 THE COURT: Okay.

16 MR. WILNER: Okay.

17 Q Did Dr. Graham have occasion to communicate  
18 -- based on your review of the medical literature,  
19 did Dr. Graham have occasion to communicate back to  
20 his former student, Dr. Ochsner, about the subject of  
21 this paper?

22 A On a regular basis.

23 Q All right. And did Dr. -- what happened  
24 with -- did Dr. Graham write a letter to Dr. Ochsner  
25 about this subject of cigarette smoking and disease?

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1 A Yes. And, in fact, the exact contents of  
2 that letter were published by Dr. Ochsner himself in  
3 1973.

4 Q And is that part of the medical literature  
5 you reviewed?

6 A It's published in a preventive medicine --  
7 in the "Journal of Preventative Medicine," 1972,  
8 Volume 2, page 611.

9 Q What happened? What did Dr. Graham write

10 Dr. Ochsner as later recounted by Dr. Ochsner?

11 A In 1958, Dr. Evarts Graham wrote his former  
12 student who had confided in Graham -- what he wrote  
13 about was his lung cancer, Ochsner said the saddest  
14 letter I ever got from anyone was from Evarts Graham  
15 two weeks before he died.

16 In it, he stated because of our long  
17 friendship, you will be interested in knowing that  
18 they found that I have cancer in both my lungs. As  
19 you know, I stopped smoking several years ago. But  
20 after having smoked as much as I did for so many  
21 years, too much --

22 MR. NYHAN: Your Honor, same objection  
23 here.

24 (Side-bar conference held)

25 MR. NYHAN: We object to counsel's having

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1 the witness read into the -- read to the jury this  
2 correspondence from Dr. Graham to Dr. Ochsner. It  
3 isn't relevant to this case, and it's only designed  
4 to prejudice the jury.

5 MR. WILNER: Well, it's certainly relevant.  
6 This is a very famous passage where Dr. Graham,  
7 who formerly stated that cigarette smoking was not  
8 dangerous, said to his former student that it --  
9 that, in fact, he now accepted it and he was dying of  
10 it.

11 THE COURT: Is that part of the evidence?  
12 Is it in evidence?

13 MR. WILNER: The Ochsner and DeBakey is.

14 I don't know if the letter is.

15 MR. NYHAN: I'm not aware this is --

16 MR. WILNER: Let's put it in then. It's  
17 fine, let's go ahead and mark all of his book. It's  
18 part of the medical literature.

19 What I tried to do in the evidence copy  
20 is not have so many documents because they were  
21 complaining about it. If necessary --

22 THE COURT: Well, if he knows what his  
23 opinion is he can state it and if he knows -- and the  
24 fact that he died of lung cancer, he can state that.

25 MR. WILNER: I won't ask him to read it

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1 then.

2 THE COURT: But, you know, Dr. Ochsner's  
3 dying declaration, is that --

4 MR. WILNER: It's not Ochsner, it's  
5 Graham. But the answer is, yes, it had a profound  
6 effect on the medical community. And also we have  
7 heard from the defense numerous testimonials from  
8 doctors, all sorts of things.

9 THE COURT: I don't have a problem  
10 necessarily with that. But if he's going to read  
11 from something, it's either got to be in evidence, or  
12 pretty soon be in evidence, or I'm going to strike  
13 it.

14 MR. WILNER: So I'm going to have to move

15 all his things in evidence. I'll be happy to do it  
16 as soon as we get a chance.

17 THE COURT: I don't know that you have to  
18 do that. Is he going to read from all of these  
19 things?

20 MR. WILNER: Well, we tried to --

21 THE COURT: What I'm saying --

22 MR. WILNER: No, he's not going to read  
23 from all of them.

24 THE COURT: So you don't need to put all of  
25 them in. But the ones he's going to read from, I

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1 think, if there is an objection, they need to either  
2 go in evidence or he can't read from them.

3 MR. WILNER: When we get a break, we will  
4 mark all the histories. I just tried to take a  
5 subset. But if it's going to be objected to on that  
6 basis, then we will offer it in a minute.

7 MR. NYHAN: Your Honor, our objection is to  
8 having him read continually from all of these various  
9 documents. It's not -- it's not an appropriate way  
10 of examination.

11 THE COURT: I thought the question that he  
12 was answering, and this is -- this is why I had a  
13 hard time determining what the objection was, is what  
14 would he have known back in 1950 the state of the art  
15 was.

16 And then all of a sudden we're reading a  
17 letter from one doctor to another saying or talking

18 about his personal case as opposed, I mean --

19 MR. WILNER: I agree. But I have to  
20 connect -- I intend to connect that. I've got to go  
21 somewhere. It's fine, he won't read it. I'll move  
22 it in evidence when we get a break.

23 THE COURT: I don't have a problem with the  
24 fact he died from lung cancer and he totally changed  
25 his opinion by the time he died.

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1 MR. NYHAN: Then let's just get to that.

2 (Side-bar conference concluded)

3 Q Did Dr. Graham die of lung cancer himself?

4 A He did.

5 Q Did he write Dr. Ochsner and tell him  
6 before he died?

7 A He did.

8 Q Let's go to Dr. Wynder and let's put  
9 Dr. Wynder up. Was that -- was he Dr. Graham's  
10 student?

11 A He was.

12 Q All right. Did he go on and write many,  
13 many papers on cigarettes and disease?

14 A Still writing papers on cigarettes and  
15 disease.

16 Q Now, in 1950, was there also confirmation  
17 from the -- from England, from the other side of the  
18 Atlantic?

19 A The other side, as they call it.

20 Q Right. And what happened, who was that?

21 A Two very important people. Sir Richard

22 Doll. I think it was Richard Doll at that point.

23 But he eventually got knighted, so it's Sir Richard

24 Doll and Bradford Hill.

25 These people were working at the

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1 Statistical Research Unit of the Medical Research  
2 Council. The Medical Research Council is a quasi  
3 government agency sort of like our NIH here in the  
4 United States.

5 And what they did was they did a study that  
6 was very, very similar to the study of Wynder and  
7 Graham, even had about the same number of people that  
8 they studied and they published it just a little bit  
9 after Wynder and Graham.

10 (Change of reporters, 12:00 p.m.)

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1           Q     Okay.  And I don't want to belabor this,  
2     but what was the significance of having two of these  
3     papers, one on -- one from Wynder and Graham in 1950  
4     over here and one from Doll and Hill in Great  
5     Britain?

6           A     It's one of those examples of the way  
7     medicine and science works.  This is called  
8     confirmation.  They actually provided some  
9     additional information.  It wasn't just  
10    confirmatory; it was aggrandizing.  If you look at  
11    my plate four, there's something important there  
12    from their paper.

13               MR. NYHAN:  The witness is leading  
14    counsel.

15               THE COURT:  Are you objecting?

16               MR. NYHAN:  No.

17           Q     Okay, did you prepare that plate?

18           A     I did.

19           Q     What's it show?

20           A     Well, first of all, I should say these  
21    numbers are directly from their paper.  And --

22           Q     This says 52.

23           A     That is correct.  I'm sorry.  This is the  
24    subsequent paper from them.  The '50 paper, to go

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1 Q Well, let's not belabor it. Were there a  
2 series of papers?

3 A There were a series of papers.

4 Q Let's get to the essence of this one and  
5 keep moving.

6 A Okay. This basically demonstrates that  
7 what they said, what Doll and Hill said, which was  
8 that in England and Wales there was a phenomenal  
9 increase in the number of deaths attributed to  
10 cancer of the lung, and that this phenomenal  
11 increase in deaths was one of the most striking  
12 changes in the pattern of mortality ever recorded by  
13 the Registrar General. And this shows what the  
14 cause of that striking increase is cigarette smoking  
15 because it shows a dose relationship.

16 Q Okay. What's the importance of this? We  
17 already saw this once before. So what?

18 A No, you didn't see this. You saw the  
19 rise. There's a parallel rise. A lot of these  
20 things look the same. You saw the rise. Go back to  
21 plate three for one second, please. That's my plate  
22 three.

23 Q Right here?

24 A That's what you saw. Now, you saw it from  
25 the United States.

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1 Q All right. So what? So it was in Great  
2 Britain, too.

3 A So what? They found the same thing. And  
4 then when Doll and Hill looked at it, they saw that  
5 there was a relationship between how much people  
6 smoked, not just whether or not they smoked, but how  
7 much they smoked, and whether or not they died of  
8 lung cancer.

9 So you look here, you see that if they  
10 smoked less than five cigarettes a day, their rate  
11 was a certain rate per death of lung cancer. And if  
12 they smoked more and more, their rate was enormous.  
13 So you see that the rate rises rapidly with  
14 increasing history of dose of cigarette consumption.

15 Q Okay. Is this the paper, British Medical  
16 Journal in evidence?

17 A It is. Let me just turn to it myself. It  
18 is my tab 31.

19 Q Okay.

20 MR. NYHAN: Your Honor, can we have that  
21 identified?

22 MR. WILNER: Wait, wait, we will. I'm  
23 trying to do that. This is tab No. --

24 A Thirty-one.

25 Q -- 21 in our evidence. Oh-oh, we've got a

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1 discrepancy. Tab 21.

2 MS. HARTLEY: This is the 1950.

3 MR. WILNER: 1950.

4 A No, you're asking me about '52, so you got

5 to go to 31.

6 Q All right. Let's go back to '50. Let's

7 move as quick as we can. Everybody on the same

8 page. Tab No. 21, British Medical Journal, 1950,

9 Doll and Hill, okay?

10 A Right.

11 Q All right. Can you get the British

12 Medical Journal in the United States?

13 A Sure.

14 Q Can the American Tobacco Company get the

15 British Medical Journal?

16 A It's in every medical library.

17 Q Can Brown & Williamson get it?

18 A Of course.

19 Q All right. How important was Dr. Doll?

20 A Extremely.

21 Q And Dr. Hill, was he well known?

22 A Extremely.

23 Q Now, is there language in here whether

24 smoking is a factor and an important factor in the

25 production of carcinoma of the lung?

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1 A What they said on page 746 was --

2 Q 746.

3 A -- this is the lead article of the BMJ,

4 British Medical Journal, of that day.

5 Q Hard to read.

6 A You see the table that -- the  
7 accreditation.

8 Q Why is the print so small in 1950?

9 A Paper was expensive. Especially the kind  
10 of paper that was sent over to the United States.  
11 There was a different version that was sent to the  
12 United States. It was printed on very thin paper  
13 sent by air mail.

14 Q Where is it? I want to find it. Okay,  
15 right here under discussion.

16 A Right.

17 Q We therefore conclude that smoking is a  
18 factor, and an important factor, in the production  
19 of carcinoma of the lung.

20 A Correct.

21 Q Based on all they did, right?

22 A Correct.

23 Q Which was study people who had the  
24 disease?

25 A Study -- what they did was they studied

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1 640 -- I'm sorry, they studied 709 lung cancer  
2 patients and 709 controls, and their conclusion was  
3 that cigarette smoking was much more common in the  
4 lung cancer patients than in the controls.

5 Q And it says the effect of smoking varied

6 as it would be expected with the amount smoked. Why  
7 is that so important? It sounds obvious.

8 A First of all, it's not obvious and,  
9 second, it's very important.

10 Q Why?

11 A It's an example of dose relationship.  
12 It's one of the things that doctors and biologists  
13 use to prove cause.

14 Q You were -- let's say you were asked --  
15 first, Dr. Wynder's paper comes in in the Journal of  
16 the American Medical Association, then Dr. Doll  
17 comes in 1950?

18 A Right.

19 Q You're asked again, American Tobacco  
20 Company comes, asks you: Doctor, what's going on  
21 here? Do we have any problem?

22 A I would say now we have a bigger problem  
23 because Doll and Hill have published a paper. Not  
24 only did they say that cigarette smoking is the  
25 cause of lung cancer, but they demonstrated a dose

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1 relationship, so now we are really in trouble  
2 because dose relationship helps to prove  
3 epidemiology. It shows that there's a biological  
4 relationship, and it helps to prove that that's  
5 cause and effect.

6 Q Let me be the Devil's advocate. It  
7 doesn't say cause. It says a factor. What does  
8 that mean?

9           A     It means a causative factor. That's  
10 medical speak.

11          Q     Does it mean the only cause?

12          A     No. And, in fact, cigarette smoking is  
13 not the only cause of lung cancer. It's just the  
14 most important cause. That's what they thought, and  
15 that's what I think.

16          Q     All right. Let's go then to 19- -- and  
17 this is 1950.

18          A     Correct.

19          Q     You also mentioned there were publications  
20 in 1952, in 1952 by Doll and Hill?

21          A     There was a whole series.

22          Q     I don't want to belabor those  
23 publications. Do they say basically the same thing?

24          A     With increasing certainty.

25          Q     And then -- now, let me just -- you've

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1     also studied what the cigarette industry has said  
2     over the years because that's part of the medical  
3     literature in a way, right?

4          A     It is.

5          Q     All right. And in the years of 1950 to  
6     1952, were they saying anything?

7          A     No.

8          Q     Did something happen in 1953 that caused a  
9     commotion?

10         A     There was indeed something that happened

11 that caused a huge commotion.

12 Q And was that the mice?

13 A That was the mice. That was Wynder,  
14 Graham, Croninger.

15 Q What tab?

16 A Thirty-eight.

17 Q Thirty-eight in the history section?

18 A Correct.

19 Q And was that the study that -- where the  
20 same Dr. Wynder, who in 1950 had reported in the  
21 Journal of American Medical Association, did the  
22 laboratory work?

23 A It was Wynder, Dr. Graham, who was still  
24 alive at the time, hadn't gotten his lung cancer,  
25 and Adele Croninger from the University of Toronto

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1 in Canada.

2 Q And did this article create a sensation  
3 here, abroad and inside the cigarette industry?

4 A It did.

5 MR. WILNER: Your Honor, it's a good time  
6 to break.

7 THE COURT: All right. Would you approach  
8 the side bar a minute. We don't need the reporter.

9 (Side bar, Court and counsel)

10 THE COURT: Ladies and gentlemen, we're  
11 going to take the lunch break. And I would ask that  
12 you be back in the jury room at 1:30, which gives  
13 you an hour and 20 minutes. We'll be in recess



14 until 1:30.

15 MR. BACKER: Recess until 1:30.

16 (Jury exits courtroom; court in recess)

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1 IN THE CIRCUIT COURT, FOURTH  
2 JUDICIAL CIRCUIT, IN AND FOR  
DUVAL COUNTY, FLORIDA

3 CASE NO.: 97-03522-CA

4 DIVISION: CV-H

5

6 ANGELA B. WIDDICK, as Personal  
7 Representative of the Estate of  
ROLAND E. MADDOX, deceased,

8 Plaintiff,

9 vs.

10 BROWN & WILLIAMSON TOBACCO  
11 CORPORATION, a foreign corporation;  
LIGGETT GROUP, INC., a foreign  
12 corporation; and WINN-DIXIE STORES,  
INC., a Florida corporation,

13 Defendants.

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14

15

16 AFTERNOON SESSION  
17 Friday, May 22, 1998  
18 VOLUME X

20 - - -

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22  
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24  
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1 P R O C E E D I N G S

2 May 22, 1998 1:30 p.m.

3 THE BAILIFF: This court is back in  
4 session. Please be seated.

5 MR. WILNER: Your Honor, what we are going  
6 to try to do with about ten minutes is we have  
7 removed from two volumes, one we call BNWCAN and one  
8 we call CON- -- CONS or CON, we call it volume C  
9 because we always say conspiracy, so we'll say C.

10 We have removed all of the claimed  
11 privileged documents so that we could try and  
12 proceed, so what we want to do now is see if we can  
13 offer these and see how -- if we can make some  
14 progress, because we're going to have to use some  
15 documents with Dr. Feingold or it's going to be  
16 impossible.

17 So we've pulled out all of the privileged  
18 and let's see if we can, you know, I --

19 THE COURT: Do you need a few minutes to  
20 talk to the defendant?

21 MS. TERRY: I have no idea what they are  
22 trying to do.

23 THE COURT: Well, that's what I'm talking  
24 about. Do you need a few more minutes?

25 MR. NYHAN: Yes. I think we could use

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1 some time, and then perhaps we could take up in  
2 chambers whatever objections we have.

3 MR. WILNER: I don't think we have to go  
4 back to chambers. I mean -- well, whatever Your  
5 Honor wants.

6 THE COURT: Well, I think the first thing  
7 we have to do is let them know which documents you  
8 are talking about, because it's my understanding  
9 that the objections to the documents go beyond the  
10 privileged documents. There were some other  
11 objections to some of the documents.

12 MR. WILNER: I understand.

13 THE COURT: So it would be fruitful, I  
14 think, for Ms. Hartley and Ms. Terry to get together  
15 and maybe Mr. Jarmel and see what they are talking  
16 about, and then we can argue on the record. I don't  
17 care whether it's in chambers or here, but I'll go  
18 back there and wait for you all to either come back  
19 there or come back out here.

20 MR. WILNER: Your Honor, we won't need

21 that. I believe we can proceed and --

22 THE COURT: While they do it outside?

23 MR. WILNER: While they do. I want to try  
24 and save time as much as I can.

25 THE COURT: If that's a problem --

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1 MR. NYHAN: No, Your Honor.

2 THE COURT: -- then we can take a recess  
3 if there is an objection.

4 Will it work that way Mr. Jarmel?

5 MR. NYHAN: Well, if we could have a few  
6 minutes just to see what is going on, Your Honor,  
7 and then advise you, Your Honor.

8 MR. WILNER: Okay. That's Fine.

9 MR. NYHAN: Your Honor, I think we need  
10 five or ten minutes to go through what they've  
11 proposed to us, and then we suggest that we meet in  
12 chambers to discuss what needs to be addressed.

13 MR. WILNER: Well, we can proceed without  
14 reference even to these documents, but I'm just  
15 trying to get something going here. I mean, we can  
16 continue with what we're doing. We will eventually,  
17 within the hour perhaps, need to refer to or offer  
18 some of these, but that is why we didn't --

19 THE COURT: Well, why don't we proceed and  
20 get to a point where you no longer can proceed  
21 without doing it, and we'll take a break and give  
22 the jury a break and you all will have had time to  
23 review what the documents are.

24 MR. NYHAN: Yes. That makes sense, Your  
25 Honor.

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1 THE COURT: You know, I allow a lot of  
2 informality, but I do not like the Dunkin' Donuts in  
3 the courtroom when the jury walks back.

4 MR. WILNER: Oh, I agree.

5 THE COURT: -- all day, so if you want to  
6 hide them somewhere or keep them out of the  
7 courtroom.

8 MR. WILNER: I agree. They're horrible.  
9 Please take them out. I don't know where they are  
10 from.

11 THE COURT: All right. Ready to proceed?

12 MR. WILNER: Yes, Your Honor.

13 MR. NYHAN: Yes, Your Honor.

14 MS. TERRY: Can I just grab one of those  
15 books, Judge?

16 THE COURT: Sure. I'll wait until you get  
17 it.

18 All right. Are you ready to proceed,  
19 Mr. Wilner?

20 MR. WILNER: Where is Floyd?

21 MS. HARTLEY: He is on his way.

22 MR. WILNER: Yes, Your Honor.

23 THE COURT: Mr. Nyhan?

24 MR. NYHAN: Yes, Your Honor.

25 THE COURT: Bring them in, please.

1 (Jury enters courtroom)

2 THE COURT: Good afternoon.

3 Mr. Wilner, you may proceed.

4 MR. WILNER: May it please the Court.

5 BY MR. WILNER:

6 Q Dr. Feingold, hello again.

7 A Yes, sir.

8 Q We have been talking about the medical  
9 literature and how scientists were working in the  
10 1940s and 1950s to prove that cigarettes caused  
11 cancer. I'm going to continue with that line for  
12 just a little while.

13 Dr. Feingold, first tell us did papers  
14 that you are reading that we have heard about,  
15 Ochsner and DeBakey, and we've heard about Wynder  
16 and Graham, Doll and Hill, are they in the medical  
17 literature?

18 A Yes. They're published in medical  
19 journals. These are special magazines that come out  
20 every month or every week and are distributed very  
21 widely all over the world.

22 Q Now, are they distributed to ordinary  
23 laypeople?

24 A No.

25 Q Are they distributed to physicians who

1 want them?

2 A They are distributed to physicians on  
3 subscription, doctors typically subscribe to these  
4 journals, and to medical libraries, both in  
5 universities and in nonacademic hospitals.

6 Q Okay. Let me direct your attention. I'll  
7 go a little faster through some of these. Let me  
8 direct your attention to tab No. 37.

9 MR. NYHAN: Which --

10 Q History, volume 6. And could you tell me,  
11 Doctor, is that a -- before we get to the mouse  
12 painting study, was that a study done the same year  
13 by the same Dr. Doll?

14 A Yes. It was published September 12, 1953.  
15 You see it here, it's under the title "Bronchial  
16 Carcinoma Incidents and Aetiology," spelled the  
17 British way. This means lung cancer frequency or  
18 how much occurs and what is causing it.

19 Q And did they by 1953 reach any more  
20 conclusions any more definitely than they had  
21 reached in 1950?

22 A Yes, they did. The conclusions were shown  
23 actually on page 590. I think that you've got the  
24 first part of it, if I'm not mistaken. That is  
25 September.

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1 Q There are actually two articles or two --

2           A     Same title.

3           Q     We have a confusion as to the tab or  
4 something?

5           A     No.

6           Q     I think that's 37, but there is -- let's  
7 go to page 590 and see. Do we have a 590? So I  
8 think there are two articles in '53, and we've had  
9 this problem before. Do you have the article with  
10 you in 590?

11          A     Right here (indicating).

12          Q     All right, let's use that instead.  
13 Evidently we've got the wrong one. We'll substitute  
14 it.

15          A     See, this is the first (indicating). What  
16 you've got up there is the first part. I've got the  
17 first part, also. And this is the second part.

18          Q     That must have fallen out of our copy, so  
19 we'll substitute this. All right. If you can see  
20 it, and respecting that we only have one copy, let's  
21 see what is important about it. What I want to  
22 direct your attention to is the first column on here  
23 where it says "direct evidence." I know it's hard  
24 to read. Let me help you.

25          A     Well, I actually have a copy.

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1           Q     You have another copy, okay. Good.  
2 "Direct evidence and relationship was first secured  
3 in 1939 by Muller in Germany." It goes on to say  
4 what he did, what Muller did; is that correct?



5 A Correct.

6 Q So does that indicate that there was even  
7 something before 1941?

8 A Correct.

9 Q And on page 585 does it talk about the  
10 consistency of reports?

11 A Exactly. What it said was, "The  
12 consistency of the results of investigations carried  
13 out with various techniques in four countries is in  
14 itself suggestive that a real relationship between  
15 smoking and lung cancer exists. The possibility  
16 that all of the results could be due to bias in the  
17 selection or interviewing of patients has been  
18 eliminated."

19 Q Now, this word consistency, was that  
20 important?

21 A It's a special word; there again, as  
22 doctors speak. It doesn't just mean consistency.

23 Q Well, let me represent to you that at  
24 the -- as of shortly after 1953 and 1954 the  
25 cigarette industry was jointly stating that the

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1 statistics could not be trusted or words to that  
2 effect.

3 A I know that they said that.

4 Q What does this say to that argument?

5 A Well, it means that that argument that was  
6 given by the tobacco industry was actually a lie.

7 Q This says --

8 A It was an untruth; that what the -- when,  
9 in fact, what the medical literature says when you  
10 go in and look at the articles themselves, they say  
11 this again and again and again, all the articles  
12 show the same thing, and they're all consistent.

13 And the word "consistent" means something  
14 special. It means that different scientists using  
15 essentially the same methods of studying people in  
16 different countries and different places get the  
17 same results.

18 Remember I talked about that before?  
19 That's one of the important things about science.  
20 You don't hide the way you are doing something. You  
21 say, look, I did this study on these people. This  
22 is exactly the way I did it. These were my  
23 methods. This is how I counted them up. This is  
24 the questionnaire. I printed the questionnaire for  
25 you to look at. Here are my statistics. This is

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1 the method that I used to do the calculations.  
2 Everything is up front, visible.

3 Now people go and they repeat it. There  
4 is nothing wrong about repeating it. It is  
5 compulsory. That is part of science. And when they  
6 repeat it and they all find the same thing, it is  
7 called consistency.

8 And that word consistency in science, in  
9 fact, it has very important implications. It means

10 that the scientific results are almost certainly  
11 correct, because they are doing them in different  
12 places on different people in different countries  
13 and different examiners, and they are all finding  
14 the same thing. But it's a pretty strong argument  
15 that it's right.

16 Q Well, I'll represent to you that in the  
17 papers that we have marked into evidence that the  
18 cigarette industry has said, and the American  
19 Tobacco in particular, that the results have been  
20 biased. Does this in 1953 discuss the question of  
21 whether the epidemiology is biased?

22 A Well, specifically, this is by Richard  
23 Doll, who is of the statistical research unit of the  
24 Medical Research Council. He knows what bias is  
25 about, and I know what bias is about. It is my

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1 opinion that the possibility of bias in 1953 had  
2 been completely eliminated. And indeed, that is  
3 what Doll said in 1953, that there was no chance  
4 that the results were due to bias.

5 Q And did Doll conclude in 1953, without  
6 pulling any punches, about whether smoking has been  
7 proven to be a cause of cancer?

8 A I think that it's clear. I mean, Doll  
9 said the results amount, I believe -- I believe to  
10 proof that smoking is a cause of bronchial  
11 carcinoma.

12 Q Now, is that a statement that is lightly  
13 made by a researcher?

14 A No, no. That is not lightly made. And in  
15 fact --

16 MR. NYHAN: Objection. No foundation,  
17 Your Honor.

18 MR. WILNER: I can ask again.

19 THE COURT: All right. I'll sustain the  
20 objection to the form of the question.

21 MR. WILNER: Yes.

22 Q Dr. Feingold, are you familiar with the  
23 terminology and the modes of expression used by  
24 researchers of this era and others?

25 A Yes, sir.

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1 Q And are you familiar with the -- what is  
2 the idea of understated, or what does it mean to be  
3 an understated or skeptical scientist?

4 A It's appropriate, correct behavior.  
5 Doctors and scientists are supposed to be  
6 skeptical. They are supposed to question and wonder  
7 and demand proof and ask for proof and make sure  
8 that things are on paper and repeated and can be  
9 documented.

10 Q Was Sir Richard Doll known to be a  
11 skeptical, conservative scientist?

12 A Yes. He still is.

13 Q What is the effect then on the overall  
14 beliefs of the -- within the medical community of

15 such a statement in 1953?

16 A Bombshell.

17 Q Let me direct your attention to tab

18 No. 39, and we'll get to the mice in a minute. It's

19 the same year 1953. Was there an editorial in the

20 New England Journal of Medicine?

21 A There was.

22 Q How important was the New England Journal

23 of Medicine in 1953?

24 A I would think it was as important. It

25 would be my opinion that the New England Journal of

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1 Medicine 1953 was at least, if not more important

2 then than it is now.

3 Q Now, an editorial is not the same as a

4 research paper, true?

5 A It's different. It has different

6 implications. It is meant to be something

7 different.

8 Q An editorial does not in itself prove

9 anything?

10 A No. In medicine, in medicine and science

11 editorials are based on facts, their analysis and

12 opinion about the facts.

13 Q Let's look at page 466. Better get the

14 whole thing.

15 Dr. Feingold, help us with where the quote

16 that you wanted to point out begins.

17           A     It is in the first full paragraph.  It's  
18 sort of in the middle of the page.

19           Q     "If such figures..."

20           A     "If such figures..."

21           Q     Right.  And what figures are they talking  
22 about?

23           A     They are talking about the multiple  
24 studies including the studies of Doll and Hill and  
25 the previous studies of Wynder and Graham.  If you

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1 look on the previous page, page 465, where they said  
2 that -- where they were talking about the latest  
3 study of Doll and Hill, based on 1,465 patients with  
4 cancer of the lung and 1,465 match controls, was  
5 carefully conducted and yielded evidence of an  
6 association between cigarette smoking and lung  
7 cancer so strong as to be considered proof within  
8 the everyday meaning of the word.

9           Q     Where were you reading from?

10           A     That is page 465, the page before you  
11 finish --

12           Q     All right, just before the page here,  
13 okay.  So and then they went on to say, "If such  
14 figures as these had been unduly publicized the  
15 public, medical and lay, shows no sign of taking any  
16 of the relatively simple courses that would  
17 undoubtedly reduce the incidence of lung cancer.  If  
18 similar data had incriminated a food contaminant  
19 that was not habit-forming and was not supported by

20 the advertising of a financial empire, there is  
21 little doubt that effective countermeasures would  
22 have followed quickly."

23 What was the significance of this  
24 appearing in the New England Journal?

25 A The editorial writer of the New England

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1 Journal of Medicine in 1953 was in my opinion the  
2 same as the editorial writer of the New England  
3 Journal of Medicine in 1998, the single most  
4 important editorialist in the United States as far  
5 as medicine is concerned, the single most important.

6 Q So as -- oh, go ahead.

7 A And I would elaborate and say that I guess  
8 the first thing that every doctor reads every week  
9 as soon as the New England Journal of Medicine hits  
10 his or her desk is to look to see what the  
11 editorials are about, because this is important,  
12 important stuff.

13 Q Let me go on: It is true that the  
14 causative mechanism underlying the association  
15 between tobacco and lung cancer is not known;  
16 although, there is ample room for speculation in the  
17 presence of known carcinogens in tobacco tar. Also,  
18 little is known about the dosage filtration of smoke  
19 and other factors that bear on the subject. What  
20 does that mean?

21 A That means that the actual mechanism.

22 When doctors and scientists speak of mechanism, it  
23 means the mechanics, the way things happen, the way  
24 that the bullet killed the person or how the bullet  
25 disrupted the cells and so on. That wasn't

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1 understood. The way, in fact, that the  
2 cancer-causing substances in tobacco smoke changed  
3 the DNA and the DNA changed to cause cancer, that  
4 was a long time in coming, that information.  
5           So they didn't know that. They suspected  
6 it. They thought that it might have something to do  
7 with these cancer-causing substances in the tobacco  
8 tar. They saw that. They knew that. But they  
9 didn't know exactly the machine. They didn't  
10 understand how the machine of the cell got messed up  
11 and broke and caused the cancer. But they said  
12 anyway even if we don't know the machine, what goes  
13 wrong with the machine, we know that the machine is  
14 breaking. And when it breaks, the patient dies.

15           And they go on to give an example, which  
16 is a classic and historical example about cholera.

17       Q    Well, let me read it. It says, "However,  
18 if control of cholera had not been initiated  
19 empirically, but had awaited demonstration of the  
20 vibrio" --

21       A    That's the bacteria.

22       Q    Yes. "...active and useful preventative  
23 measures would have been delayed 50 years. What are  
24 they talking about?



25           A     Well, they're talking about a famous

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1    doctor whose name was Snow.  And Dr. Snow in the  
2    1800s recognized that people in London were dying of  
3    cholera.  There was cholera epidemic in London.  It  
4    was just about 1850.  There was a cholera epidemic  
5    just about 100 years before all of these articles  
6    started to get written.

7                   And Snow was the one who recognized that  
8    within the City of London the cholera cases were  
9    clustered in one area of the city, and when he  
10   investigated it he found that the area of the city  
11   where these cases were all occurring were all served  
12   by one water company.  This is a famous story in  
13   medicine.  It has to do with control of public  
14   health problems.

15                  So the company was called the Broad Street  
16   Company.  There was a Broad Street pump.  There were  
17   actually two companies that drew their water from  
18   the River Thames below a sewage plant.  The  
19   companies that were drawing their water from above  
20   the sewage plant, those people weren't getting sick,  
21   but the companies that were taking their water from  
22   the River Thames from below the sewage plant in fact  
23   that's where the cholera cases were all occurring.

24                  He said take the handle off the Broad  
25   Street pump.  There was a lot of controversy about

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1 it that day because the people who were running the  
2 -- I think it was the Vauxhall Water Company  
3 weren't so happy about it, but in fact that's what  
4 happened. The water supply from that company was  
5 stopped and the cholera epidemic was stopped.

6 Q Well, did they know what caused cholera  
7 when they took the handle off the Broad Street pump?

8 A Not until about 1900, because the vibrio  
9 -- you see that thing vibrio? That's the name of a  
10 bacteria, vibrio cholera. That's the little strange  
11 bacteria, comma shaped, that actually causes  
12 cholera. Nobody saw that for another 50 years.

13 Q So is that well known in the public health  
14 community, the story of John Snow and the Broad  
15 Street pump?

16 A Classic story.

17 Q And what does it illustrate?

18 A It illustrates that lives can be saved by  
19 epidemiological understanding of disease; that if  
20 you recognize that certain things are causing people  
21 to be sick and to die, then even before you figure  
22 out the exact mechanism, how the illness proceeds  
23 and kills the person, you had better do something to  
24 stop the disease.

25 Q I also wanted to call your attention to

1 one statement in here. "It is not insufficiency of  
2 evidence that accounts for lack of such measures  
3 against tobacco tar."

4 Do you agree as of 1953?

5 A As of 1953 the evidence was overwhelming.  
6 There was an abundance of evidence in favor of the  
7 observation that the people who smoked cigarettes  
8 got lung cancer, and the people who didn't smoke  
9 cigarettes didn't get lung cancer.

10 Q Why didn't everybody agree?

11 A Well, most doctors --

12 MR. NYHAN: Objection, Your Honor.  
13 Speculation.

14 MR. WILNER: I'll withdraw it.

15 THE COURT: I'll sustain the objection.

16 Q Okay. Would this -- now, let me represent  
17 to you -- well, no reason for a long question. When  
18 the famous mouse painting experiment of '53 finally  
19 occurred or occurred in 1953, was it against a  
20 backdrop of there being no other supporting  
21 evidence?

22 A No. In fact, the important part about the  
23 mouse painting experiments, the crucial aspect of it  
24 is that it was biologically coherent. This is  
25 another concept. It's a concept of science, and

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1 that is that as scientists we see certain things.  
2 We look at the real world and we see certain things.

3 We see -- I see my patients dying of lung cancer. I  
4 see certain things. And I recognize that virtually  
5 the only people who get lung cancer are cigarette  
6 smokers, and the people who don't smoke don't get  
7 lung cancer. Now that's an observation.

8 And then we can look at the observation in  
9 very complicated ways with all these numbers and  
10 statistics and studies and all of this stuff, and we  
11 can repeat the studies, epidemiological studies,  
12 hundreds of times is what happened.

13 But we then have to look at some other  
14 information like biology. We have got numbers. We  
15 have got statistics. Now let's look at the  
16 biology. Animal studies are biology. If you do  
17 biological studies and they show results that are  
18 consistent with -- there is that word, scientific  
19 word consistent again -- consistent with the  
20 epidemiology, it's another argument in favor of the  
21 cause.

22 Q Sometimes can you do biological studies  
23 that have no relevance to humans?

24 A Sure. I mean animals get diseases that  
25 people never get. I mean animals, cats and dogs get

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1 distemper. People don't get distemper. So if there  
2 was something that caused distemper in there or  
3 increased the likelihood that a cat would get  
4 distemper, it wouldn't matter hugely to us.

5 So, of course, there are biological

6 differences between animals and people, and those  
7 differences make some studies useless or of no  
8 application to people.

9 Q Well, the fact that some studies on mice  
10 may be useless, does that mean -- is that a valid  
11 scientific basis for calling the studies that were  
12 done by Wydner and Graham in '53 useless?

13 A That is a lie, you see. That --

14 Q Explain that.

15 A Well, you have to understand the science.  
16 You have to understand biology. If a bio- -- a  
17 biologist would never say that. A doctor would  
18 never say that. It is a wrong thing to say because  
19 you have to understand that when we do research on  
20 animals, we do it for consistency reasons. We do it  
21 to see if our observations on human beings are  
22 correct and if we can alter the illness of human  
23 beings. We don't just do it on animals to torture  
24 animals. We use the animal studies to prove things  
25 that we suspect are true in people.

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1 So with that understanding, we know that  
2 biological testing on animals has relevance in  
3 certain well-defined circumstances. And the fact  
4 that there is no relevance in other circumstances,  
5 doesn't mean that animal studies shouldn't be used.  
6 Animal studies have to be used. They prove things  
7 about human disease that could not be proven

8 otherwise or that help in the proof of causes of  
9 human disease.

10 Q Let me show you just for a minute  
11 Dr. Graham again. Do you see that machine that he  
12 is standing behind?

13 A Yes. That is a machine that he and  
14 Dr. Wynder devised.

15 Q What does it do?

16 A It smokes Lucky Strike cigarettes.

17 Q What do they do with it when they smoke  
18 the Lucky Strikes?

19 A They used a log. I forget how many --  
20 they said how many cigarettes, hundreds, thousands  
21 of cigarettes of Lucky Strike cigarettes, and they  
22 obtained tar, a residual material from the smoking  
23 of these cigarettes. And they used this material to  
24 put onto the backs of mice. They shaved the hair  
25 off the backs of the mice and they applied this

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1 material to the mice.

2 Q And what are those things on the back of  
3 the mice?

4 A Those things are cancers that developed on  
5 the back of the mice.

6 Q And were there a lot?

7 A Yes. First of all it was difficult to  
8 keep the mice alive. The application of smoke tar  
9 to the mice tended to kill them. If you look, the  
10 blue bar in this on the right-hand side, the

11 right-hand side is about survival. See the word  
12 down there? I made this slide.

13 Q Survival.

14 A Survival for 20 months. Mice don't live  
15 real long. And 20 months is, I think, about two  
16 thirds of their usual life span or more.

17 But in any case, so what they did was they  
18 shaved the backs of some of the mice and they put  
19 material on the backs of the mice that did not  
20 contain the tobacco tar, and then they shaved other  
21 mice and put the material on the mice.

22 Now, the right-hand section of this slide  
23 shows that the mice that were not poisoned with the  
24 tobacco tar, were not given the tobacco tar,  
25 outlived about 20 months -- well, there was a 50

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1 percent survival. It took 20 months. But of the  
2 mice who were painted, only ten percent survived 20  
3 months.

4 Q All right. Let me get this straight  
5 because I can't see the columns. The blue is what?

6 A The blue is untreated mice, that is, they  
7 did not get tobacco tar put on them.

8 Q And the red got tobacco tar?

9 A Were tarred mice.

10 Q So this is the cancer side over here. How  
11 many of the mice with no cancer, with no cigarette  
12 tar, got cancer?

13 A None.

14 Q How many of the ones with cigarette tar  
15 got cancer?

16 A About 40-odd percent. I think it was 44  
17 percent.

18 Q And these are the controls as far as the  
19 survival rate?

20 A Right.

21 Q Not all of the groups. These are the  
22 tarred mice, and these are the untarred mice?

23 A Correct. So the tarred mice didn't live  
24 very long, or they lived a lot less longer than the  
25 untarred mice. And in terms of the cancer, the

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1 tarred mice had a 44 percent incidence of  
2 histologically proven carcinoma, whereas none of the  
3 mice that were not tarred developed that kind of  
4 tumor.

5 Q Well, does this mean that mice are men? I  
6 mean, are mice little men?

7 A Mice are mammals, you see. They are a  
8 mammalian animal. They are not human beings,  
9 obviously. They're a different class, but they  
10 react biologically in certain ways exactly like  
11 other mammals do, whether they are elephants or  
12 people, because mammals have a certain similarity.  
13 Their DNA, when you look at the DNA of mice, there  
14 is a lot of the DNA that is exactly the same as  
15 ours.



16           Q     But they had to put so much tar on these  
17 mice. I mean, how is that comparable in any way to  
18 humans smoking?

19           A     You know, mice don't live very long. As I  
20 said, mice live a relatively short period of time.  
21 And not only that, but the skin on the back of the  
22 mice is much more resistant to damage from  
23 cancer-causing substances than the delicate tissue  
24 inside our lungs. So it was necessary in order to  
25 achieve an effect, it was necessary to use a larger

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1 dose. That is done so as to make it possible to  
2 find a result. If we were going to use a much lower  
3 dose, there would be no result because the mice  
4 would die before the result was observed.

5           The key thing to understand about this  
6 plate is that it is actually very, very simple.  
7 Tarred mice got cancer; untarred mice didn't get  
8 cancer, period.

9           (Change of reporter, 2:00 p.m.)

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1 Q Now, let me go to the human for just a  
2 second. First of all, you're not claiming, are you,  
3 that, you know, mice -- that this is a direct and  
4 immediate correlation that proves in and of itself  
5 that people get cancer from cigarettes, right?

6 A No, I'm not saying that. But what I'm  
7 saying is that this is a piece of biological  
8 evidence that taken in the light of this powerful  
9 and consistent statistical evidence is in itself a  
10 powerful thing.

11 Q Now, let me just ask you a little bit  
12 about this concept, this concept of dose and the  
13 amount of condensate and everything.

14 As smoke gets in the lungs, does it go  
15 to all places in the lungs equally? Is it  
16 like -- is it like evenly distributed, or is it  
17 deposited at certain places that may be -- not a  
18 good question.

19 A Well, it is deposited. You see, there  
20 tends to be deposits of anything that you inhale at

21 bifurcations. Bifurcations are slits.

22 I didn't show this earlier, but the fact  
23 is that the way we're made and the way mice are made  
24 or dogs, in fact, is that we have a central airway,  
25 a central trachea, the main airway, and that goes

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1 and divides into two, the right main stem bronchus,  
2 the left main stem bronchus. Each of those main  
3 bronchi divide into other bronchi and other bronchi  
4 and other bronchi, so it's like a tree to the point  
5 that you actually have millions of very small  
6 bronchial tubes.

7 Now, at each division point there is some  
8 turbulence of air as it moves down. And turbulence  
9 tends to deposit materials. So the tendency is that  
10 there's some deposition in different spots.

11 On the other hand, the particulates in  
12 this aerosol -- tobacco smoke is an aerosol -- the  
13 particulates in the aerosol are so small that they  
14 get carried by the air stream, some impacting as  
15 they go along, sort of like a stuttering, if you  
16 think about it; it sorts of stutters its way all of  
17 the way out to the --

18 Q Can you get a place in the lung where over  
19 time you have a constant deposition of carcinogens,  
20 and maybe in one a little location, and not even  
21 know about it?

22 A Of course. Well, there's deposition

23 everywhere in the lung. It's all going on at the  
24 same time. Plus, remember, it's getting delivered  
25 there by the bloodstream, too.

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1 Q And how would we know what the  
2 concentration of carcinogens would be at a  
3 particular tiny little cellular spot in the lungs --

4 A It's not --

5 Q -- over a lifetime?

6 A You can't know that.

7 Q After the human data is counted, do we  
8 know that there -- that whatever is getting into  
9 these little parts is having an effect?

10 A Correct.

11 Q Do you know that -- let me represent to  
12 you, as you've seen in evidence, that the cigarette  
13 industry has said that there aren't enough  
14 carcinogens in cigarettes to cause cancer or any  
15 other disease. How do you respond to that?

16 A It's grossly incorrect.

17 Q And prove it, just in two sentences, if  
18 you can.

19 A There are soups. See what happens is  
20 cigarettes are a soup. It's an aerosol. It's like  
21 a soup. You inhale a soup of cancer causing  
22 substances. These cancer causing substances, A, we  
23 know cause cancer in human beings; and, B, we know  
24 if we take some of those substances and put them on  
25 animals, it causes cancer consistently.

1           Q     Now, as the results of the mouse painting  
2     experiment were public -- and they not only went  
3     into the -- into the professional press but they  
4     were also carried in the lay press as well, were  
5     they not?

6           A     Oh, yes. In fact, I think the picture  
7     that you showed is from "Life Magazine."

8           Q     So you're not saying that there was no  
9     access, that no one had any access to any of that  
10    medical information, right?

11          A     No. In fact, doctors and scientists and  
12    anybody who had a responsibility and a need to know  
13    could easily have accessed this information.  
14    Practically 50 years after I can access this  
15    information, sure.

16                But, on the other hand, individual human  
17    beings who are not scientifically trained and not  
18    medically trained would have no way of understanding  
19    these papers. I mean, they may have seen some  
20    reference in the newspaper, but there is -- there  
21    would be no way to go and look at the mouse skin  
22    painting experiment and understand it medically.  
23    You need it to have -- you need to have it  
24    explained.

25          Q     Okay. So as the -- I was about to say, as

1 the mouse painting data became -- was out there, the  
2 cigarette industry, based on your review of the  
3 documents, did what?

4 A Well, the industry responded in early  
5 1954. They did something, which was to create a  
6 committee which was called at that time the Tobacco  
7 Institute -- or, I'm sorry, the Tobacco Industry  
8 Research Committee, and they, as their first act,  
9 produced a document. This was a public document.  
10 They published an advertisement in many  
11 newspapers in the United States, and it went to  
12 hundreds of thousands of people. This was published  
13 in 1954. And the document was called -- or  
14 advertisement was called, a Frank Statement -- Frank  
15 Statement to cigarette smokers.

16 Q Okay. And we've seen this several times  
17 in this case already, and we're not going to go  
18 through the whole thing. But are you familiar then  
19 with the agreement with the -- between the industry  
20 and the TIRC that led to this and many other things  
21 like it?

22 A Yes. At the bottom of that --

23 MR. NYHAN: Your Honor, objection. Third  
24 or fourth witness; accumulative.

25 THE COURT: All right. I sustain the

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1 objection.

2 MR. WILNER: Your Honor, if I might. I'm  
3 just establishing for a transition.

4 THE COURT: He's familiar with the  
5 document.

6 MR. WILNER: Sir?

7 THE COURT: He is familiar with the  
8 document and the history of it.

9 MR. WILNER: Yes.

10 BY MR. WILNER:

11 Q Sir, and you are familiar with this  
12 document and the history of it?

13 A I know who signed it.

14 Q All right. So that brings us up to 1954.  
15 Now, is the -- as of the beginning of 19- -- well,  
16 let me ask you this way: What happens in 1954  
17 that's so important to this whole issue?

18 A Well, another extremely important  
19 epidemiological paper was released, was actually  
20 read by E. Cuyler Hammond on June 21st, 1954, in San  
21 Francisco at the national conference of the American  
22 Medical Association.

23 Q Tab 47 of Volume VI in the history book?

24 A Correct.

25 Q All right. Now, why was this something to

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1 take into account?

2 A This was a new thing. It was another  
3 piece of evidence, a new kind of evidence.

4 Q What kind of evidence was this?

5 A This was a very large prospective study,  
6 future looking study. There's a difference between  
7 retrospect and prospective studies. It's an  
8 important difference, hard to understand.

9 Q And we're not going to go into it.

10 A Okay.

11 Q All right. All we're going to say --

12 A All the statistics.

13 Q All right. We're going to keep moving.

14 A Okay.

15 Q So this is 1954, and why is this important  
16 without going into the technical details of it?

17 A Without the technical details, I just will  
18 generalize by saying that in contrast to looking  
19 backwards, to taking people who have lung cancer and  
20 asking them whether they smoked or not, this is a  
21 looking forwards paper. That's what a prospective  
22 study is.

23 What Hammond did -- and Hammond was a  
24 biostatistician with the American Cancer Society.  
25 And he worked with a few other people. He worked

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1 with Horn, who was a psychologist, and Garfinkel,  
2 who was also with the ACS, American Cancer Society,  
3 as a statistician.

4 And these people what they did was they  
5 initiated a huge study which actually began in  
6 1951. They obtained volunteers and eventually



7     trained 22,000 American Cancer Society volunteers.  
8     They interviewed 187,766 men in 394 counties in 11  
9     states in the United States, and they watched what  
10    happened to them over a period of time.

11           Q     Okay.

12           A     So they followed them.  In other words,  
13    they interviewed these people and then they watched  
14    what happened to them over the ensuing months.

15                   They had expected not to finish their  
16    test, their study, until the late 1950s, but, in  
17    fact, by 1954 the results that were coming in were  
18    so dramatic that they went ahead -- Hammond actually  
19    read this paper to the American Medical Association  
20    meeting in San Francisco, and they published the  
21    paper in August of 1954.

22           Q     All right.

23                   MR. WILNER:  Stephanie, go back to the  
24    paper for a second, the actual paper.

25    BY MR. WILNER:

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1           Q     Now, this involved 187,000 people?

2           A     187,766 patients -- or men.

3           Q     By the American Cancer Society?

4           A     Yes.

5           Q     And Hammond was involved with the Cancer  
6    Society at the time?

7           A     Yes.  He was actually employed with the  
8    American Cancer Society.  He had been hired by

9 Charles Cameron.

10 Q Did he intend originally for this study to  
11 run many years and publish it like in the late  
12 1950s?

13 A They thought it wouldn't be finished  
14 until '58.

15 Q Why did they come out with it in '54?

16 A They did what you're supposed to do. If  
17 during the conduct of a medical study dramatic  
18 results are found that have an implication for the  
19 health of people, it's required to break your  
20 pattern, break your plan, and go ahead and publish  
21 early. So that's what they did, they published  
22 early.

23 Q Okay. And this chart the jury has seen.  
24 It's called, "Death Rates, Well Established  
25 Diagnosis." And this says -- this is from 1957,

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1 actually. Is this data substantially similar to  
2 what was obtained in '54?

3 A Yes. It's basically the same. I mean,  
4 it's based on -- it's based on the same study and  
5 based on the same results.

6 Q All right. And since we've seen this  
7 before I don't want to go into it in great detail,  
8 but tell us why this was important in 1954 or 1957  
9 when this exact chart came out, why this was so  
10 important?

11 A Because it proves that cigarette smoke is

12 the cause of lung cancer. It proves that people who  
13 did not smoke, never smoked, had a very, very low  
14 incidence -- not zero, but a very, very low  
15 incidence of lung cancer. It proves that the more  
16 that people smoked, the more their chance was of  
17 getting lung cancer and dying of it. This is a  
18 death chart, death from lung cancer, specifically  
19 from non-adenocarcinoma, bronchogenic carcinoma of  
20 the lungs.

21 Q After this type of data came out was there  
22 any way to argue that air pollution was a  
23 substantial cause of lung cancer compared to  
24 cigarette smoking?

25 A No. It's impossible because, you see, in

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1 the tiny little box of nonsmokers, never smokers,  
2 are, of course, people who were exposed to the same  
3 air as in the box of the two-plus per day cigarette  
4 smokers. That's an important concept.

5 You see, you can't argue that air  
6 pollution was the cause of lung cancer in the face  
7 of this data. It's impossible. Almost all of the  
8 lung cancer we see is in the smokers.

9 Now, the smokers and the nonsmokers are  
10 exposed to the same air, obviously. So if the air  
11 was an important contributor to lung cancer, that  
12 little box, you see the three per hundred thousand  
13 per year, the little box there on left-hand side?

14 Three per hundred thousand per year, that's the  
15 death rate from lung cancer in their study  
16 population among people who never smoked.

17 So if it's air pollution or bad diet or  
18 lack of exercise or being stupid, or whatever it is  
19 that you want to -- that the tobacco industry wants  
20 to blame people for being the cause of lung cancer,  
21 it's all in that little itsy bitsy teeny little box  
22 over there because the -- all of the other cancers  
23 are in the cigarette smokers.

24 Q All right. Did the data as it was -- was  
25 the data finally published in '58 that had fully --

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1 that fully developed some of these ideas?

2 A Right. The final version -- the final  
3 version was published in '58.

4 Q And is this another example of one of the  
5 Hammond charts showing the difference between urban  
6 and rural lung cancers in smokers and nonsmokers?

7 A Correct.

8 Q And how does this work?

9 A Well, you see that people who were never  
10 smokers almost never not lung cancer, whether they  
11 lived in cities or towns or wherever they lived.

12 Q Are these the small boxes down here?

13 A Small boxes.

14 But people who smoked had a lot of lung  
15 cancer wherever it was that they lived. Now, if you  
16 look you'll see that there's a slightly less lung

17 cancer in rural areas and towns than there are in  
18 cities, but there's a simple explanation for that,  
19 and it has nothing to do with air pollution.  
20 Because there's lots of air pollution in rural  
21 environments, it's just a different kind of air  
22 pollution.

23 Q What's the explanation for the slightly  
24 higher thing in the city?

25 A Well, the explanation is an important

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1 explanation. Where do you think people go if they  
2 live on a farm and they get a strange disease like  
3 lung cancer? They don't stay in the farm town.  
4 They go -- they go to a mayo clinic in Minnesota;  
5 they go to New York City from a rural area in New  
6 York to get operated on. People tend to die in big  
7 city hospitals.

8 So there is an effect, and this is a  
9 well-known -- I mean this is not just lung cancer,  
10 this is -- if you'd study leukemia deaths, there are  
11 more leukemia deaths in cities. That's because the  
12 leukemia centers are in cities. The deaths are  
13 reported in the cities.

14 Q Was there also revealed in work in the  
15 late '50s that there was an independent effect for  
16 age?

17 A Yes.

18 Q And explain this.

19           A     Well, this was an effect on when a person  
20     started to smoke cigarettes. The earlier a person  
21     starts to smoke cigarettes, the worse is the risk.  
22     So that if, for example, a person starts to smoke  
23     cigarettes under the age of 15, that's where you  
24     have the lower than 15, the amount of lung cancer  
25     death is greater. If they start smoking over 15 but

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1     under 20, it's less and so on and so forth.

2                 So what this chart just shows is that the  
3     earlier a person starts to smoke, the worse it is in  
4     terms of lung cancer. And, unfortunately, in our  
5     country at the moment our mean age of starting to  
6     smoke is 14.4.

7           Q     One of the arguments that the cigarette  
8     industry has used for -- or used in the 1950s  
9     and '60s and later -- I'm not sure when they  
10    stopped -- was that women weren't getting lung  
11    cancer, and that there must be something peculiar to  
12    this, and it couldn't be caused by cigarettes  
13    because women smoked. Will you address that?

14          A     Well, this was ridiculous argument  
15    number -- whatever it is.

16                 MR. NYHAN: Your Honor, object; move to  
17    strike.

18                 THE COURT: All right. And I'll sustain  
19    your objection.

20                 Doctor, we'll get through your testimony  
21    sooner if you would try to answer the question

22 without prefacing it with your personal opinion  
23 without the remarks, okay? You can -- you can give  
24 your personal opinion but if you answer the question  
25 first, then don't discuss it, but...

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1 All right, Mr. Wilner.  
2 MR. WILNER: Yes, Your Honor.  
3 BY MR. WILNER:  
4 Q Is this a valid argument?  
5 A My personal opinion?  
6 Q Your professional opinion.  
7 A My personal professional opinion. Very  
8 few of my opinions are nonprofessional.  
9 Q All right. What's your opinion?  
10 A My personal professional opinion is that  
11 this is a ridiculous argument.  
12 Q What happened to women in this country  
13 from cigarette smoking?  
14 A They developed lung cancer. And they were  
15 currently experiencing an epidemic of lung cancer in  
16 women. It just took longer because women started to  
17 smoke later than men did. So that's what this  
18 shows.  
19 If you look at lung cancer death rates, as  
20 you go along it gets worse and worse. Now, of  
21 course, the number of women who get lung cancer who  
22 didn't smoke stays the same.  
23 Q Is that the black boxes down here?

24           A     Yeah, the little boxes at the bottom are  
25     the small rates of lung cancer, not zero but small,

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1     in nonsmokers. And as you see, as the years go on,  
2     there's more and more and more lung cancer in woman.

3                 Now, the full chart brought out until 1998  
4     is even worse. So we actually have a lung cancer  
5     epidemic in women today, and it is so bad that many  
6     more woman are dying of lung cancer than breast  
7     cancer today; formerly, the most important cancer  
8     killer of woman.

9           Q     All right. Now, that was 1958. Well, we  
10    started in '54 and we jumped up a little in '58.

11                Let's -- let me ask a question and put in  
12    perspective. If you had been -- do you remember I  
13    asked you earlier, 1950 Wynder and Graham, Doll and  
14    Hill, Ochsner and DeBakey, you're asked by a  
15    cigarette company, what's the present state of the  
16    knowledge. You don't have to tell me again because  
17    we heard it the first time, but just to lead into  
18    the question.

19                Let's say it is now 1954 and we have heard  
20    not only the 1941, but the 1950 papers from both  
21    sides of the Atlantic, the 1953 Doll -- Hill -- a  
22    Doll paper that said there's proof, the 1953 Wynder  
23    & Graham mouse painting paper, and the 1954 Hammond  
24    & Horn results announced at the -- in mid-1954, what  
25    we've just talked about, that information has now



1    come in.  You're called, you're an independent  
2    consultant, you're called on the phone.  It's a  
3    cigarette company like American Tobacco, Brown &  
4    Williamson.  They say, Dr. Feingold, we understand  
5    that you are an expert, you followed the medicine.  
6    We would like to know, sir, what is the situation  
7    with respect to our product.  What would you tell  
8    them?

9           A     I would tell them that we have a grave  
10   situation; that our product is -- or their product  
11   is the cause of a lung cancer epidemic; that there  
12   was no possible doubt that the results from Wynder  
13   and from the British workers was correct; it  
14   absolutely was correct; and that the composite  
15   evidence, statistical evidence and biological  
16   evidence, such as skin painting experiments, but  
17   also biological evidence from human beings -- there  
18   was evidence in '57, Auerbach's work which was very  
19   important as well, the totality of the evidence was  
20   such that there could be no question that cigarette  
21   smoking was the cause of lung cancer.  And given  
22   that situation, if I'm advising the manufacturer of  
23   cigarettes, I would say in '58 that there was an  
24   emergency, a public health crisis, related to their  
25   product.

1 Q Now, if -- let me go back to the per  
2 capita -- or the cigarette consumption chart. Do  
3 you remember this from the Surgeon General's report?

4 A Yes.

5 Q And this shows how the cigarette started  
6 out almost nothing and grew to a huge crescendo in  
7 the 19 -- in the mid-1960s and then since then have  
8 fallen off?

9 A Correct.

10 Q Now, if the tide had been turned in the  
11 1950s before this huge peak and this huge delay, can  
12 you tell us as an expert what would have happened to  
13 this curve, this lung cancer curve, which  
14 continued -- which climbed so steeply?

15 MR. NYHAN: Objection.

16 THE COURT: Okay. Approach the side bar.

17 (Side-bar conference held outside the  
18 hearing of the jury)

19 MR. NYHAN: Objection; irrelevant and  
20 speculation, Your Honor. He's not competent to  
21 offer an opinion about what might have happened, and  
22 in addition he's speculating.

23 MR. WILNER: Well, I don't think that's  
24 true.

25 THE COURT: Well, I think he can give his

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1 opinion to that. I guess the reason I talked to the  
2 doctor as I did is because he has a habit or a

3 tendency -- I don't care if he says I think that's  
4 absurd. He says everybody thinks that's absurd who  
5 is credible medically, and I don't think he can  
6 continue to reinforce his opinion with everybody  
7 else's.

8 Now, you know, he can say I don't know  
9 anybody, any scientists, who would have said that.  
10 Perhaps, maybe and maybe not, but you know what I'm  
11 talking about.

12 MR. WILNER: Well, I'll try and do what I  
13 can with him.

14 THE COURT: But as far as -- I think he's  
15 qualified to draw the conclusion that if it's his  
16 opinion that cigarettes -- smoking cigarettes -- an  
17 increase in smoking cigarettes causes an increase in  
18 lung cancer, or decreasing smoking cigarettes  
19 decreases lung cancer. So I don't have a problem  
20 with that portion of it.

21 I don't know exactly what he's going to  
22 say.

23 MR. NYHAN: And, Your Honor --

24 THE COURT: I think it's speculation, but  
25 I think it's a conclusion that an expert can draw on

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1 his opinion, probably. Okay.

2 MR. NYHAN: I also object to the fact that  
3 counsel in his questions seems to be either egging  
4 the doctor on or inviting him to make these

5 argumentative characterizations of what other people  
6 think, which are inappropriate .

7 THE COURT: Well, I'm having difficulty  
8 with it because I think that it's a legitimate  
9 question and answer from his research as to what  
10 other medical people -- information they had during  
11 a period of time, so necessarily he's going to talk  
12 about other people.

13 On the other hand, the reason I sustained  
14 your objection before was because of the little  
15 quips of bolstering his testimony. You know, it's  
16 not like -- not only do I think this, but everybody  
17 thinks this.

18 MR. WILNER: I understand.

19 THE COURT: But no credible person could  
20 argue otherwise, you know.

21 MR. WILNER: I know. That's kind of in  
22 the middle, but.

23 THE COURT: Right. But I'm talking about,  
24 you know, certainly no one that anybody should pay  
25 any attention to.

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1 MR. WILNER: I think that's okay.

2 THE COURT: Well, no, he said there may be  
3 some wrong people back there, or whatever.

4 MR. WILNER: Well, again, I don't think --  
5 I think that this is a punitive case. I think that  
6 we're not having tea, you know.

7 THE COURT: I'm letting you -- I'm giving

8 you a lot of leeway.

9 MR. WILNER: But I understand the Court's  
10 concern and I'm trying to steer away --

11 THE COURT: It's more towards bolstering  
12 his own credibility as opposed to what he's saying.

13 MR. WILNER: I understand. Okay.

14 (Side-bar conference concluded;  
15 proceedings resumed before the jury)

16 BY MR. WILNER:

17 Q Dr. Feingold, I don't want to belabor  
18 this, but if we -- if we had been able to turn the  
19 tide here on cigarette consumption before it reached  
20 these proportions, what is your opinion as to what  
21 would have happened here? And I know that this is  
22 in some degree a projection or an estimate, because  
23 it didn't happen. But give us the science behind  
24 the prediction.

25 A I don't agree that it's a guess or an

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1 estimate. I think it's actually very, very  
2 predictable. It's as predictable as can be. The --  
3 predictably what would have happened is that the  
4 downturn in lung cancer incidence in men that is  
5 seen there would have occurred earlier.

6 It's all a lag phase. It's between 20 and  
7 30 years. Some time ago I was talking about the  
8 latency period between starting smoking and getting  
9 cancer. So here's a way of connecting the

10 epidemiology with my observation in my examining  
11 room. The fact is that there's a latency between  
12 starting to smoke and getting lung cancer, and  
13 that's what we're seeing there.

14           If you turn the curve down and get people  
15 to stop smoking, at least stop children from  
16 starting to smoke, then the incidence of lung cancer  
17 in this curve, in men, would have declined much  
18 earlier than it did.

19           Q     And if the downturn had occurred when the  
20 Ochsner & DeBakey paper was published back in early  
21 1940s, how many lives -- or don't count the lives,  
22 but would that have made a dramatic difference in  
23 the lung cancer epidemic in this country?

24           A     It would have made a huge difference if  
25 the -- if what Ochsner & DeBakey said in 1941 was

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1     listened to by the tobacco industry and was -- it  
2     was there for them to hear, then there would be a  
3     huge affect on the lung cancer epidemic in our  
4     country, we wouldn't be sitting in this room, and  
5     Mr. Maddox would be here.

6           Q     The --

7           MR. NYHAN:  Objection; move to strike.

8           THE COURT:  All right.  I'll sustain your  
9     objection as to the last part.

10    BY MR. WILNER:

11           Q     Well, let me ask you this, then,  
12     Dr. Feingold:  Without telling us what would have

13 happened if, or something like that, do you view  
14 that this cigarette consumption pattern is causally  
15 related to the death of Mr. Maddox?

16 A Absolutely.

17 Q And if that had been changed -- or I'll  
18 phrase it another way. Is that -- fine. That's my  
19 question. Okay.

20 (Change of reporter, 2:30 p.m.)

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1 Q Now, let me -- thank you. I want to jump a  
2 little bit because I want to move -- let's go to tab 58  
3 just for a second. In England did they accept as of  
4 1957, Volume 6, tab 58, that there was a relationship of  
5 direct cause and effect between cigarette smoking and  
6 cancer of the lung?

7 A They did.

8 Q And was that an editorial at the Medical  
9 Research Council's statement on tobacco smoking and  
10 cancer of the lung?

11 A Yes, it was.

12 Q And was the Medical Research Council an  
13 official body that was organized to study the matter?

14 A It was, yes.

15 Q And in 1957 did Graham -- Wynder and Graham  
16 produce cancers on the ear of rabbits, an application of  
17 this?

18 A They did, yes.

19 Q And did the fact that they cross species  
20 further prove?

21 A Further biological proof, yes.

22 Q Now tell us, in 1957 another -- was there  
23 another prong, another kind of very serious proof that  
24 came into the picture?

25 A There was. And --

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1 Q Did that mean -- let me state -- did that  
2 mean the evidence was not sufficient to act upon in

3 1950?  
4 A Oh, no. That doesn't mean that at all.  
5 Q All right.  
6 A There was abundant evidence in 1941, but  
7 certainly by 1950 there was overwhelming evidence and a  
8 need to act. There was no action, but there was a need  
9 to act. By 1953 there was a compulsion, an absolute  
10 requirement to act, but --  
11 Q All right.  
12 A -- you know, the evidence continued to  
13 accumulated over the years. There is Oscar Auerbach.  
14 Q What happened in 1957? This is -- states  
15 1956, but what happened in 1957 that was so important?  
16 A Dr. Auerbach, Oscar Auerbach, was a  
17 pathologist. That's a doctor who looks at the slides  
18 taken of tissues taken from human beings, make a  
19 diagnosis. He worked in the Veterans Administration  
20 Hospital in East Orange, New Jersey, and he conducted a  
21 huge study, looking at patients who had died at the  
22 Veterans Administration Hospital at around that time.  
23 In fact, he looked at 150 patients who died  
24 and had autopsies at the V.A. Hospital. Of the 150  
25 people who died, 34 actually died of lung cancer. Now,  
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1 the others died of other things, and of all the 150  
2 patients who died, 16 were nonsmokers, and the rest were  
3 cigarette smokers.  
4 MR. NYHAN: Your Honor, may I have a moment  
5 to look at the script that the doctor is reading from?  
6 MR. WILNER: Sure.  
7 MR. NYHAN: Perhaps we can mark that.  
8 MR. WILNER: You mean the paper that he  
9 produced, or his research?  
10 MR. NYHAN: Could we have that marked, Your  
11 Honor.  
12 MR. WILNER: We will move it into evidence,  
13 Your Honor.  
14 MR. NYHAN: Your Honor, I would simply like  
15 to make the point that counsel and the witness are  
16 reading from the same script. I don't care how we do  
17 it.  
18 MR. WILNER: It's all the same.  
19 THE COURT: Well, ladies and gentlemen, I am  
20 going to ask that you step back into the jury room just  
21 a minute. Call you right back. You can stretch.  
22 (Jury exits courtroom)  
23 THE COURT: All right. I think we need to  
24 clear up the record. You know, if there is such a  
25 script that they are both reading from, then we need to  
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1 have that on the record. If there isn't, I think the  
2 record needs to be cleared up. I have seen the doctor  
3 glance at various papers. He has all of the documents  
4 up there. I was not aware that -- if indeed he is, that  
5 he is reading from a prepared script.  
6 MR. WILNER: I don't know what that is. I  
7 will move it into evidence whatever it is.



8 THE COURT: Well, I mean, I will give you  
9 time to look at it, Mr. Nyhan. You make a determination  
10 of what you think it is or it isn't. And I assume  
11 Mr. Wilner is using Plaintiff's No. 6 and the documents  
12 that he's been listing by number in that book, and that  
13 the doctor has been referring to those and on occasion  
14 other documents. But I further assume from -- and I  
15 have been watching him that he hasn't been reading from  
16 a script but reading from certain documents. Now if  
17 you --

18 MR. NYHAN: Your Honor, I just happened to  
19 observe the doctor referring to that. Yes, he is  
20 referring to the documents in his books. Yes, they have  
21 both been referring to aids they have put up on the  
22 screen, but it became -- it appeared to me that they  
23 were both reading from the same script, and I thought  
24 that that's a matter that ought to be on the record.

25 MR. WILNER: Well, I hope we are both reading  
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1 the same thing. And I move into evidence at this  
2 time -- I will lay the predicate -- Dr. Feingold's  
3 excerpted quotes. They have had a copy of this for  
4 weeks. It was put into evidence, although it has been  
5 expanded a bit, but in essence it was put into evidence  
6 in the Carter case. It is excerpts from the historical  
7 literature. It is a summary of the historical  
8 literature. I am going to move it in. We have marked  
9 it and we have said that -- sure.

10 MR. NYHAN: Well, I'd like to mark the two  
11 pieces, then; the one the doctor is using and the one  
12 that counsel is using.

13 MR. WILNER: Afraid you can't use mine, but I  
14 will be happy to represent to the jury we all -- we use  
15 the same piece, but mine has my own notations on it  
16 Counsel. Sorry.

17 THE COURT: Okay. I will accept that  
18 recommendation.

19 THE CLERK: Number 32.

20 MR. NYHAN: Mark it for identification.

21 THE CLERK: You want it for ID or --

22 MR. WILNER: Well, I am going to move it in,  
23 but I don't need to take the Court's time now.

24 THE COURT: At this point I will mark it for  
25 identification, Mr. Wilner. I don't know why it would

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1 be relevant as an exhibit.

2 MR. WILNER: Your Honor, I would ask --

3 THE COURT: -- since it's a composite or  
4 summary.

5 MR. WILNER: Your Honor, before you rule  
6 there is a section in the evidence code which  
7 specifically covers summaries which we would at the  
8 appropriate time, we would do it.

9 THE COURT: I will give you an opportunity to  
10 argue it later, but right now --

11 MR. WILNER: Yes, Your Honor. Yes, Your  
12 Honor. But now since we have had a pejorative comment

13 by counsel, I would like the opportunity to ask  
14 Dr. Feingold what he does have there, to tell us what it  
15 is. I think that -- to show it at least -- yeah, to at  
16 least identify what it is.

17 THE COURT: I am not going to show it to the  
18 jury.

19 MR. WILNER: Yes, Your Honor, I understand.

20 THE COURT: All right. I will allow you to  
21 ask him what he has in front of him, what Mr. Nyhan was  
22 referring to.

23 MR. WILNER: Sure.

24 THE COURT: And he can say it's a summary I  
25 made from the various articles and leave it at that at  
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1 this point. Okay.

2 MR. WILNER: Sure. Yep. Is that an extra  
3 one, or do you have yours?

4 MS. HARTLEY: That's an extra one.

5 MR. WILNER: We are ready.

6 THE COURT: You can give it back to him even  
7 if it's marked.

8 MR. WILNER: That's an extra one. We listed  
9 this as an exhibit, Your Honor.

10 THE COURT: That's fine.

11 MR. WILNER: All right.

12 THE COURT: Are you ready to proceed?

13 MR. WILNER: Yes, Your Honor.

14 MR. NYHAN: Yes, Your Honor.

15 THE COURT: All right. Bring them in,  
16 please.

17 (Jury enters courtroom)

18 THE COURT: All right, Mr. Wilner.

19 MR. WILNER: May it please the Court. We  
20 have an objection or is he just standing?

21 THE COURT: No, he is just standing.

22 MR. WILNER: Okay. He gives me the willies.

23 THE COURT: Is there an objection to  
24 Mr. Nyhan standing?

25 MR. NYHAN: Withdrawn a stand, Your Honor.

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1 MR. WILNER: It gives me the willies.

2 THE COURT: All right.

3 Q Dr. Feingold.

4 THE COURT: I am not familiar with that as a  
5 legal objection, Mr. Wilner.

6 MR. WILNER: All right.

7 THE COURT: Go ahead.

8 MR. WILNER: Sounds good.

9 Q Dr. Feingold, Mr. Nyhan wanted to know what  
10 you are reading from. Will you tell him?

11 A Oh, yeah. Happy to. I am proud of this.

12 Q All right. Tell him what it is.

13 A Understand what I do -- what I did, for  
14 example, with this and many other projects is I sit and  
15 I work and read an article. Now, I am not reading the  
16 article, you see. What I do is I read the article,  
17 every word. I then -- then I read it again. Then I

18 read it again. Then I read it like the tenth time.  
19 Then I look at the numbers. If I understand the  
20 statistics -- if I have the ability to do the math,  
21 because some statistics are different areas than my  
22 expertise, but if I know the math itself, I check the  
23 math myself, calculate. I have got it on the computer.  
24 Actually, the calculator is on the computer. I check  
25 the math, yes. You know, I sometimes find mistakes.

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1 Q All right. Get to the paper.

2 A The bottom line is I look at all of this, I  
3 study it, and then I highlight it. And when I highlight  
4 it, I take those sections that I highlight and I put it  
5 into a table, the exact quotes with the page number.  
6 Now I may make some comments about the quotes. For  
7 example, I may put as an aid memoir, a thing to just  
8 remind me a little bit, who some of the people were  
9 because I just want to remind myself what their names  
10 were or something like that, or some little aspects  
11 about who they were or what year it was.

12 I put that in the table too, but I take direct  
13 quotes that I think are very important, put them into a  
14 table and put the reference number and so -- and I  
15 can -- I can quickly and easily refer to those quotes  
16 which I thought were vitally important.

17 Q Now do you and I talk about this stuff?

18 A Of course.

19 Q How much?

20 A A lot. I mean, sometimes we have spent a day  
21 on one paper.

22 Q And do you give me these summaries and so  
23 forth?

24 A I do. Sure. In fact, this one has my name  
25 on it. It's got my name on it when -- you know.

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1 Q Very good. All right. So let's go to 58,  
2 and we just -- just for a second. Was it the  
3 conclusion -- we are not going to bother to put it up  
4 because I just want to move through some of this very  
5 rapidly.

6 Was it the conclusion of the Medical Research  
7 Council statement on tobacco smoking and cancer of the  
8 lung that the opinion of the council in England in 1957,  
9 the most reasonable interpretation of this evidence is  
10 that the relationship was one of direct cause and  
11 effect?

12 A Exactly. Direct cause and effect.

13 Q All right. Then we were to the Auerbach --  
14 I'm sorry. I lost my train of the thought with that  
15 exchange.

16 We are now to the Auerbach -- what do you want  
17 to call it?

18 A Study.

19 Q Study.

20 A It's a big study in the V.A. Hospital.

21 Q The jury has seen these rather difficult --  
22 zoom in please, Stephanie -- rather difficult to see

23 pictures. And tell us -- just get us back on this page  
24 because it's been a week since we have seen these  
25 pictures. What are we looking at?

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1 A These are cross-sections of bronchial tubes,  
2 so that bronchial tubes from people who died at the V.A.  
3 Hospital in East Orange New Jersey in 1957 about -- were  
4 taken, and they were fixed informally and then put into  
5 special plastic or wax and sliced very, very thin, coded  
6 and looked at under the microscope.

7 Q And what are these things up here?

8 A Those are called cilia.

9 Q What good are they?

10 A They are these very delicate -- many, many,  
11 many delicate little hairlike structures which move an  
12 escalator of mucus constantly in our lungs. What they  
13 do is these cilia all beat fast in one way and slow in  
14 the other. So they beat fast in one way and then slowly  
15 in the other, fast and slow, and what they do is they  
16 progressively, constantly move the mucus. It's called a  
17 mucociliary escalator. Just like an escalator,  
18 continuously moving up. This is the mucociliary  
19 escalator that continuously moves a little bit of mucus  
20 up from the very bottom of your lungs up towards the  
21 top.

22 Q Is this to protect your lungs?

23 A It does because we inhale all kinds of stuff  
24 during the normal course of the day. We inhale pollen,  
25 we inhale bacteria. People sneeze next to us, and we

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1 inhale droplets of their mucus ourselves. I mean, all  
2 kinds of things are being inhaled, and they impact on  
3 the mucus, and the mucus ciliary escalator brings it up,  
4 and we cough it up, (coughs) like this, during the day,  
5 and swallow it, and plummet -- these bacteria plummet  
6 to their death in our stomachs. They explode and --  
7 sort of gross, but that's what happens.

8 Q You brought up an interesting issue. There  
9 has been a question of these carcinogens that are in  
10 smoke that are also in food?

11 A Yeah.

12 Q Why is the stomach and the gut different from  
13 the lung in terms of how resistant it is to this kind of  
14 damage?

15 A Well, human beings and animals have evolved  
16 completely different -- I mean, human beings and animals  
17 evolved different systems that are completely different  
18 for dealing with the environment. We put all kinds of  
19 junk in our mouths. I mean, it's unbelievable the stuff  
20 that we eat, and it carries all kinds of things. So our  
21 alimentary tract --

22 Q Which is?

23 A From our mouth to your anus, the GI tract,  
24 all right, has evolved in such a way that it is very  
25 resistant. It's sort of like the skin on the back of

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1 your hand. It's pretty tough. Now it does important  
2 things which absorb food and so on, but it has developed  
3 a mechanism to be resistant to a wide variety of poison.  
4 So, the inside of your gut is a lot more resistant than  
5 the inside of your lungs.

6 Q What is stomach acid do to most chemicals?

7 A Dissolves almost everything. I mean, you can  
8 literally swallow a nail, and the nail will dissolve in  
9 your stomach.

10 Q What about your lung?

11 A You don't have that kind of protection.

12 Q I mean, is a lung a delicate organ?

13 A The lung is delicate, and when you go in the  
14 operating room or in the autopsy room and you cut into  
15 the lung, you see that it is very delicate.

16 Q Is it really -- is it -- I will come back to  
17 that. I couldn't think of the question.

18 Now is this what Auerbach did?

19 A Right. What he did was he took the lungs  
20 from 150 people who died, and he prepared 28,638 slides.  
21 These slides were taken from different levels of the  
22 lung, myriad of levels of the lung of each of these 150  
23 people who died. They were all coded -- all the slides  
24 were coded with numbers.

25 Q Coded?

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1 A Meaning a number was put on them, 28,638  
2 numbers were put on these slides, and they were all  
3 mixed up, all shuffled.

4 Q Why did he shuffle them?

5 A Because Dr. Auerbach wanted to look at these  
6 slides without knowing whether the people had died of  
7 lung cancer or whether or not they had been smokers. So  
8 he wanted to look at the slides blinded -- blind in the  
9 sense that he didn't know whether the slides were coming  
10 from smokers or not from smokers.

11 Q All right. So this -- and then when he  
12 sorted it out, I just want to go through these three  
13 that we have seen. Go back to the normal first set. He  
14 took a picture of the normal or typical normal in a  
15 nonsmoker which had the hair on it, right?

16 A Yeah, the little cilia.

17 Q And then go to next one. And I guess this is  
18 just a typical one, right, because he did thousands?

19 A Right. Thousands and thousands.

20 Q And this one is kind of denuded. It looks  
21 like someone cut the trees down here.

22 A Correct. The cilia themselves have been  
23 bladed or damaged or gone.

24 Q The third one. Now what?

25 A You passed metaplasia, which means that the

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1 cells are changing. And here --

2 Q Go back to the second one, Stephanie. Thank  
3 you.

4 A There you go.  
5 Q It's a terrible photo, but what's going on,  
6 once the trees are down, what happens to the soil?  
7 A What happens is you have changed the cells,  
8 and there is something called squamous metaplasia.  
9 Squamous metaplasia is not a good thing to have inside  
10 the lung. It means that the cells have been  
11 fundamentally altered, and they are now acting as if  
12 they belong somewhere else on the body, and they are  
13 getting ready to transform into an absolute actual  
14 invasive cancer.  
15 Q Don't go into detail, but does this have  
16 something to do with this DNA business again?  
17 A It has everything to do with DNA, but, of  
18 course, Auerbach didn't know it at the time.  
19 Q Let's go to the third one. It looks really  
20 erect. What is this?  
21 A This is erect. This is cancer in situ, which  
22 means this is actual cancer.

23 Q Cancer?  
24 A Cancer. Now "in situ" means it's just in  
25 that spot. It hasn't gone down and invaded into the  
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1 blood vessels and lymph nodes and all of that stuff.  
2 It's actually a little cancer.  
3 Interestingly, not every single cancer in situ  
4 goes on to form a complete cancer. Some of it  
5 regresses. Now people have cancer in situ in other  
6 parts of the body too. Women go for Pap tests every  
7 year or every two years. They go for Pap tests because  
8 they are looking for cancer in situ. The reason is that  
9 if you find cancer in situ in the cervix of a woman, you  
10 can take the cervix out, and they will never get cancer.  
11 It's early enough to prevent a cancer from invading the  
12 rest of the woman's body. Unfortunately, there is no  
13 way to find cancer in situ in a living person's lung.

14 Q Why not?  
15 A There is no test for it. It's impossible.  
16 The cervix is one spot. So the gynecologist can go in,  
17 and with a very primitive instrument just take a  
18 little -- some cells from the surface of the cervix.  
19 That's why woman go every couple of years. They put it  
20 on the slide, look at it under a microscope, they look  
21 to see if the woman has got carcinoma in situ. It's not  
22 good if they do, but it's lot better than not knowing,  
23 because they can cut the cervix out.

24 Q But you said you could look in the lung. Why  
25 can't you look and check it out and cut out?

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1 A Because there's one little cervix, and there  
2 are millions of bronchial tubes. So we can't look in  
3 each one of the millions of bronchial tubes.

4 Q How big -- if you spread the lung out, the  
5 area of the lung, how big would it be?

6 A Don't remember exactly. Probably be about  
7 the size of this room. So it would be huge. It would  
8 be real big. You can't look at it under the microscope.

9 It could never be done. It's not possible to find that.  
10 Q Do some of these things persist if you start  
11 smoking, and even if you stop, do you still have these  
12 things?

13 A Well, yes. If a person continues to smoke,  
14 then these carcinomas in situ, first of all, increase in  
15 frequency; and, secondly, some of them go on to form  
16 invasive frank cancers.

17 Q Can they form invasive frank cancers even  
18 once they stop?

19 A Of course.

20 Q So is it a matter of probability?

21 A It's a question of chance in that sense.  
22 Some people get it, some people don't. It depends on  
23 how long they live. Various other factors.

24 Q So if somebody comes in to you and they say,  
25 Doctor, I feel fine. I have been smoking for twenty

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1 years, but I still feel okay. Is there a test to see  
2 whether they've got cancer in situ?

3 A Well, the test that was done, which I'd like  
4 to show on the slide here, Auerbach --

5 Q Which slide?

6 A Was done on dead people. Nine and ten.

7 Q Which one do you want first?

8 A Nine.

9 Q Okay. Here is 9.

10 A Unfortunately, this is what we can't do in  
11 living people. This is what he did on dead people.

12 Q I don't mean to be gross, but do you mean did  
13 he chop the lung up into little sections so you could  
14 see all of this area?

15 A Actually, what they did is they started from  
16 up high in the lung, and they did hundreds and hundreds  
17 of cuts of determined areas in the lung in all 150  
18 people, and they prepared slides from all of that.

19 Q Okay.

20 A Tens of thousands of slides, and they looked  
21 at it, and here is what they found.

22 First of all, I have got two different types  
23 of problems here on this slide. The light blue is  
24 something called bronchial cell hyperplasia.

25 Q All right.

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1 A Bad thing to have.

2 Q Okay.

3 A And the red is squamous metaplasia, a worse  
4 thing to have.

5 Q Okay.

6 A Now, if you look, you will see the never  
7 smokers, down there, have a little bit of it. You can  
8 find in people who have died about 2 percent of  
9 bronchial cell hyperplasia or squamous metaplasia. It  
10 occurs in normal people. Fortunately, this kind of  
11 thing can reverse.

12 But look what happens as you smoke more and  
13 more. If you are a pack-a-day smoker, it's more like in

14 the range of 6 percent. If you are less than a pack a  
15 day. If you are more than a pack a day, it's in the  
16 range of 10 percent. If you actually have cancer, then  
17 when they go in and chop up the lung in areas other than  
18 the cancer area -- so this is not from the cancer  
19 area -- this shows that the patients who actually died  
20 of cancer had even more of this bronchial cell  
21 hyperplasia and squamous metaplasia. It shows that  
22 there is a continuum of events which we know is true  
23 from DNA as well.

24 Q Let's go to the next step which is the  
25 carcinoma in situ, right?

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1 A Right.

2 Q Plate 10.

3 A Okay. Now, this shows something a little  
4 different. First of all, we are talking to carcinoma  
5 in situ. Remember, I said that carcinoma in situ can  
6 stay in place unchanged, and it can reverse. It  
7 oftentimes goes ahead and causes invasive cancer.

8 As you can see, 1 percent of the slides --  
9 that's not one percent of the people, but 1 percent of  
10 the slides -- remember, there are tens of thousands of  
11 slides. One percent of the slides that were prepared  
12 from patients who did not smoke cigarettes had this  
13 carcinoma in situ. If they smoked but less than a pack  
14 a day, 4 percent had it. If they smoked more than a  
15 pack a day, 6 percent had it. There's a dose response.  
16 It's another example of dose response. If they actually  
17 had lung cancer, it was a little bit more than 6  
18 percent.

19 Q Do you give this information to patients that  
20 you are counseling on trying to get off cigarettes?

21 A I sure do.

22 Q The carcinoma in situ information from  
23 Auerbach, was that something that you -- if you had been  
24 asked about as a physician on consultation would have  
25 thought was really important?

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1 A This article was published as a lead  
2 article -- a lead article in The New England Journal of  
3 Medicine January 17, 1957. One of the greatest honors  
4 that a person who is doctor can ever hope to have. That  
5 was an article published as a lead article in the New  
6 England Journal. All I would say, it's really, really  
7 important. If somebody asked me in 1957, Dr. Feingold,  
8 this thing about Auerbach and the cigarette smoking and  
9 the changes in the cells, is it important, I would say  
10 it's hugely important.

11 Q Now let's go up to tab No. 73, just in the  
12 interest of time. And tell us about a New England  
13 Journal of Medicine article in 1960, and then we are  
14 almost done with this subject. What happened in 1960 in  
15 the New England Journal?

16 A All right. Let me just turn to it. All  
17 right. There is an editorial that's published in 1960,  
18 and there certain observations are made based on all of



19 this information that had been published so far.  
20 Q So tell us -- let me read the first  
21 paragraph.  
22 Although the search should continue for a  
23 carcinogen in cigarette smoke -- what does that mean?  
24 A The cancer-causing substance.  
25 Q Were there at that time hints of different  
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1 chemicals that had been identified?  
2 A Indeed, there was.  
3 Q Is there any one chemical which is  
4 responsible for all the cancer in cigarettes?  
5 A No, there is not.  
6 Q There is already sufficient evidence on hand  
7 to implicate smoking as the principal etiologic factor  
8 in the increased incidents of lung cancer, and lives can  
9 be saved if these facts are made known to the medical  
10 profession and to the smoking public.  
11 Do you agree with that?  
12 A I agree with that, and I agree with it from  
13 the perspective of what they said. Look up a little  
14 higher in that page.  
15 Q Look up.  
16 A Up a little bit higher above "responsible  
17 observers." It's -- it's in the middle of the second  
18 paragraph. There it is.  
19 Q Let's start from the beginning, because I am  
20 a little confused. It's over 20 years since  
21 Drs. Lombard and Dooring in these pages -- what pages?  
22 A The pages of the New England Journal of  
23 Medicine.  
24 Q First suggested an association between  
25 smoking and cancer. Now we didn't even mention that  
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1 one.  
2 A No. There are lots of them.  
3 Q Since that time there have been over two  
4 more -- there have been over two more -- two score.  
5 What's a score?  
6 A Twelve.  
7 Q All right. Two score similar studies, all of  
8 which -- did they italicize "all"?  
9 A Yes.  
10 Q All of which have shown the same association  
11 and have progressively implicated excessive cigarette  
12 smoking. No responsible observer can deny this  
13 association, and the evidence is now sufficiently strong  
14 to suggest a causative role.  
15 Do you agree with that pronouncement in 1960?  
16 A Precisely.  
17 Q In fact, do you think that the evidence was  
18 strong enough to suggest a causative role back in 1950?  
19 A Yes, I do.  
20 Q In the face of this evidence, the response of  
21 the tobacco manufacturers and their spokesmen has been  
22 deplorable. They have distorted the facts beyond  
23 recognition. A bewildering array of paper --

24 A Tips.  
25 Q -- tips have been added to their products.  
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1 What are they talking about?  
2 A Filters.  
3 Q Ostensibly to filter out harmful substances,  
4 the very existence of which they deny. They have been  
5 unwilling to follow the example of the distilling  
6 industry which reaps profits while never denying and  
7 occasionally calling attention to the fact that  
8 excessive drinking leads to -- thank you -- leads to --  
9 you knew that happened, didn't you. It's okay. You  
10 have got a numeric. Excessive drinking leads to  
11 drunkenness.

12 Now I lost my train of thought. They have  
13 been unwilling to follow the example of the distilling  
14 industry which reaps profits while never denying and  
15 occasionally calling attention to the fact that  
16 excessive drinking leads to drunkenness.

17 Give us your professional comment.  
18 A My professional comment is that indeed the  
19 editorial writer of the New England Journal of Medicine  
20 was precisely correct in a couple of things. Well,  
21 actually, in most things, but a couple of things really  
22 I thought were important.

23 One is that the response of the tobacco  
24 industry in the face of this overwhelming  
25 incontrovertible emergency-type information was  
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1 deplorable. I would say "deplorable" was a term that  
2 the editorial writers of New England Journal of Medicine  
3 would very rarely use.

4 MR. NYHAN: Your Honor, objection.  
5 THE COURT: All right. I will sustain the  
6 objection. He can give his opinion, but I don't --  
7 MR. WILNER: Okay.

8 A My opinion is that indeed the response to  
9 this overwhelming information, consistent information  
10 biologically proven information, the response was  
11 deplorable. I think that that's precisely correct.

12 I agree that it is deplorable and illogical to  
13 deny the presence of cancer-causing substances in the  
14 the products that they were making when they knew that  
15 the substances were in their product. And I think that  
16 the issue was clearly that the tobacco industry was  
17 involved in a process of distorting the facts.

18 This is the problem. That it was a  
19 distortion --

20 MR. NYHAN: Your Honor, again, objection.  
21 THE COURT: All right.  
22 MR. WILNER: Your Honor, he is giving his  
23 opinion.

24 MR. NYHAN: He is giving his argument.  
25 THE COURT: Wait a minute. Let's approach  
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1 the side bar.  
 2 (Side-bar conference held outside the hearing  
 3 of the jury)  
 4 MR. WILNER: Let me withdraw the question and  
 5 start again. I understand the objection.  
 6 THE COURT: What I am saying is he hasn't --  
 7 you haven't gone into with him with the response to the  
 8 fact except that Frank Statement.  
 9 MR. WILNER: Right.  
 10 THE COURT: Also, how much -- how many -- are  
 11 you at a point where we can take a break? I mean, I  
 12 don't want to --  
 13 MR. WILNER: As soon as I finish this  
 14 document, in three minutes we will take a break.  
 15 THE COURT: That's all right.  
 16 (Side-bar conference concluded; proceedings  
 17 resumed before the jury)  
 18 MR. WILNER: I'll withdraw that question.  
 19 MR. NYHAN: Your Honor, I also move to  
 20 strike.  
 21 MR. WILNER: I'll withdraw that question in  
 22 the interest of time.  
 23 THE COURT: It's stricken, the answer and the  
 24 question.  
 25 Q Dr. Feingold, do you agree as of 1960 that  
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1 this editorial was correct?  
 2 A My opinion is that this editorial was  
 3 correct.  
 4 Q All right. Now let me go on. Pull it up a  
 5 little bit, Stephanie, please.  
 6 Although the search should -- this is what we  
 7 had we talked about first. Although the search should  
 8 continue for a carcinogen in cigarette smoke, there is  
 9 already sufficient evidence on hand to implicate smoking  
 10 as the principal factor in the increased incidents of  
 11 lung cancer, and lives could be saved if these facts  
 12 were made known to the medical profession and to the  
 13 smoking public. It is not necessary to have precise  
 14 information on etiology -- what is that, again?  
 15 A The reason, the cause.  
 16 Q To prevent disease. Vaccination protected  
 17 against small pox more than a hundred years before the  
 18 virus was identified, and the cholera vibrio was  
 19 unsuspected at the time that John Snow had the foresight  
 20 and courage to take the handle off the Broad Street  
 21 pump? Is that what you told us --  
 22 A I told you about the handle and Broad Street  
 23 pump. The cigarettes are the handle on the Broad Street  
 24 pump.  
 25 Q Let me ask you if you agree with this as a  
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1 public health statement. Lives will continue to be lost  
 2 if control measures must wait definitive studies. Lives  
 3 will be saved if physicians can now persuade their  
 4 patients to stop smoking.

5 Do you agree?  
6 A Exactly.  
7 MR. WILNER: Good time to stop.  
8 THE COURT: All right. It's about three  
9 minutes after, so we will take the mid-afternoon break.  
10 And we will ask you to be back in the jury room at 25  
11 after. We will be back in 22 minutes. Recess.  
12 THE BAILIFF: Recess until 25 minutes after  
13 three.  
14 (Change of reporters, 3:10 p.m.)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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1 (Proceedings resumed, jury absent)  
2 THE COURT: What I intend to do,  
3 Ms. Hartley and Mr. Nyhan, is to bring the jury back  
4 in and tell them that we have some business to take  
5 care of, so I'm just going to send them home early  
6 and come back at 9:00 Tuesday or 8:00 Tuesday.  
7 MS. HARTLEY: 9:00 is fine, Your Honor.  
8 THE COURT: I'm sorry.  
9 MR. MATTHEWS: I was going to ask  
10 Mr. Wilner, but 9:00's fine.  
11 THE COURT: The only reason I ask is  
12 because I don't know about Dr. Feingold's schedule.  
13 MS. HARTLEY: I think we'll -- he'll be  
14 coming that morning, so 9:00 will be fine.  
15 THE COURT: Mr. Wilner, one question:  
16 8:00 Tuesday or 9:00 Tuesday for the jury or 8:30.  
17 MR. WILNER: Your Honor, I really would  
18 like to say 9:00 just because we can't get much done

19 after -- I mean, there are only so many hours in the  
20 day. I guess if we start too early, we're going to  
21 be dead. I'd rather cut an hour out of the  
22 examination, so I'd like 9:00.

23 THE COURT: I didn't know about your  
24 witness scheduling problems.

25 MR. WILNER: Yes, Your Honor. I think,

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1 actually, it will work better since he can sometimes  
2 come in on a morning flight, that we wouldn't make  
3 8:00, but we would make 9:00.

4 THE COURT: Then I'm going to have them  
5 come in and excuse them for the evening, and we'll  
6 adjourn to chambers to discuss. Are you ready to  
7 proceed, Mr. Wilner?

8 MR. WILNER: Yes, Your Honor.

9 THE COURT: Mr. Nyhan?

10 MR. NYHAN: Yes, Your Honor.

11 THE COURT: Bring them in, please.

12 (Jury enters courtroom)

13 THE COURT: Ladies and gentlemen,  
14 something has come up during the break, or I would  
15 have told you this before the break. We're going to  
16 need some time, the attorneys and I. And since it's  
17 already 3:35, we decided to just release you and let  
18 you go on home today and come back at 9:00 Tuesday.

19 Now it is important, as I told you many  
20 times, not to discuss the case with anyone else nor

21 to read any newspaper articles or watch anything on  
22 television concerning this case or any publicity  
23 about tobacco in general, if you will.

24 After this case is over with, you'll be  
25 free to do whatever you wish. But at this point,

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1 please try to stay away from any of that material if  
2 you encounter it. All right?

3 And if you're back in the jury room at  
4 9:00 Tuesday morning, we should be able to start  
5 right at Tuesday morning. Do you need to see me?

6 JUROR: Possibly.

7 THE COURT: I didn't know if you worked  
8 out your problems.

9 JUROR: I think I may have it worked out.

10 THE COURT: Okay. I can talk to you  
11 Tuesday if you need to, if it's not a problem  
12 today.

13 Jury is dismissed until 9:00 Tuesday  
14 morning.

15 (Jury is dismissed at 3:35 p.m.;  
16 proceedings resumed in chambers)

17 MR. WILNER: I don't know what, Jackie,  
18 what procedurally. But we're in the --

19 THE COURT: What I would like to do is  
20 define what we're going to do Monday and have y'all  
21 give me, both sides, as much information --

22 MR. WILNER: Fine, okay.

23 THE COURT: -- as I can reasonably absorb

24 between now and Monday.

25 MR. WILNER: Okay.

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1 THE COURT: I'm talking about memos, a  
2 general overview of what you're going to argue  
3 about. I don't mean the argument, I mean which  
4 documents. And I think they fall into various  
5 categories, the British Tobacco Association  
6 documents, the solely Brown & Williamson documents,  
7 the Merrill Williams documents, the Minnesota  
8 documents.

9 MR. WILNER: True, true. The -- well,  
10 Your Honor, let me see if I can move this along.

11 THE COURT: Can we go off the record just  
12 a minute?

13 (Discussion off record)

14 MR. WILNER: Your Honor, let me see if I  
15 can first -- without arguing merits, let's see if we  
16 can just define what's going on. I'll start  
17 somewhere tangible.

18 This is a volume which we call B&W-CAN,  
19 and it has research reports in it from -- mostly  
20 from BAT and there may be a few that come from  
21 Brown & Williamson itself.

22 But an illustrative one is tab 2, which is  
23 called the Smoke Group -- a little hard to read.  
24 It's the Smoke Group Program.

25 THE COURT: I was looking to see if there

1 was an index.

2 MR. WILNER: I have an index here. This  
3 is a digest of B&W-CAN.

4 THE COURT: Is this one of the indexes  
5 that you gave me?

6 MR. WILNER: Probably. Yeah, I think we  
7 tried, from time to time -- there are a little  
8 modifications of those -- well, I do have one there.

9 THE COURT: All right.

10 MR. MATTHEWS: Just put it in the front of  
11 that book, Your Honor.

12 MR. WILNER: Okay.

13 MR. MATTHEWS: You have to pull --

14 MR. WILNER: Push those little wingy  
15 things at the end together, push them up and that  
16 will lock them.

17 One group of documents is called this  
18 B&W-CAN documents. And the reason we call them that  
19 is because they're Brown & Williamson cancer  
20 research documents, and they're mostly scientific  
21 reports. And I believe there were a few privilege  
22 documents -- three privileges, and we withdraw the  
23 three privileges. So all -- the only issue here is  
24 whatever other objections, relevance or something.

25 So I would hate to start getting into the



1 merits. I mean, if you want to, but I thought I  
2 would just lay out the overview and not argue. So  
3 that is one set of documents, and we contend they're  
4 research reports from either BAT over in England or  
5 from Brown & Williamson itself.

6 THE COURT: And there are, after  
7 withdrawing them, there are still 50 documents?

8 MR. WILNER: No, because the withdrawals,  
9 we didn't renumber them.

10 MS. TERRY: The privileged documents are  
11 17, 18 and 45.

12 THE COURT: 17, 18 and 45 withdrawn.

13 MS. TERRY: Withdrawn pending the  
14 privilege argument on Monday, as I understand.

15 MR. WILNER: And we may very well go on  
16 with those. I wasn't really interested in bothering  
17 about it.

18 MS. TERRY: And, Your Honor, I have no  
19 objections to document 20 and 24.

20 THE COURT: 20 and 24, no objections.

21 MR. WILNER: Okay.

22 MS. TERRY: Your Honor, it is defendant's  
23 position that the primary objection we have to the  
24 remainder of the documents in B&W-CAN, which is  
25 roughly now, approximately, 45, is because most

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1 certainly they are not scientific reports.

2           These documents, for the most part, Judge,  
3   are opinions of individuals, corporate policies,  
4   they're speculation, they're tentative theories or  
5   hypotheses by one scientist making a note to  
6   himself, talking about maybe we should do this;  
7   maybe we should look ahead to this. Absolutely no  
8   action's being taken.

9           And I think if Mr. Wilner -- and again, I  
10   don't really want to argue the merits -- but it is  
11   our position that we contend, most certainly, the  
12   documents are not pure, hard science reports under  
13   the Dartez principle or the Feriorni (phonetic)  
14   principle, which is an April 8th, 1998, Fourth DCA,  
15   cited at 1998 West Law 158631.

16           And I have a copy for, Your Honor. And  
17   it's a little bit of a more stringent principle and,  
18   again, without wanting to get into the merits of the  
19   argument, I'd like Your Honor to have this.

20           MR. MATTHEWS: Do you have a copy for us?

21           MS. TERRY: I have a marked-up copy.

22           MR. WILNER: That's fine.

23           THE COURT: This is what I'm talking  
24   about. I can read this between now and Monday.

25           MS. TERRY: Do you need my document

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1   specific objections, or do you now have them, absent  
2   privilege, absent --

3           MR. WILNER: So the next group it.

4           MS. HARTLEY: B&W-NIC.

5 MS. TERRY: Can I go back a minute without  
6 interrupting you, excuse me. I think some -- do  
7 you want to submit documents, as well?

8 What I'd like, Your Honor, is I have  
9 selected a couple of samples. Unfortunately they  
10 have some of my work product on them, but perhaps I  
11 can draw your attention to what I consider are  
12 very --

13 THE COURT: Which number are they on the  
14 tab here?

15 MS. TERRY: There are No. 11, No. 13,  
16 No. 22, No. 25, No. 30, No. 40, No. 47, No. 48.

17 MR. WILNER: No. 40?

18 MS. TERRY: Yes. 47, 48, 49. And that,  
19 to us, Your Honor is just a very good  
20 representation.

21 THE COURT: I'll try to read that.

22 MS. TERRY: Okay.

23 MR. WILNER: Okay. And of course our  
24 position is not only Dartez issue, but Brown &  
25 Williamson is also a defendant.

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1 THE COURT: Okay.

2 MR. WILNER: And he smoked their product  
3 as well. All right.

4 The next -- I take it we'll flesh these  
5 arguments out when we get to them on Monday.

6 THE COURT: Sure.

7 MR. WILNER: The next volume is called the  
8 Nicotine volume or, actually, Brown & Williamson  
9 Nicotine.

10 MS. TERRY: You didn't tell me that. All  
11 you said was that it was Conspiracy and B&W-CAN.

12 MR. WILNER: Let's try to lay out just  
13 what it is we're going to try to put in. I'm not  
14 going to try to argue the merits. I'm not.

15 MS. HARTLEY: Your Honor asked us when  
16 John and I were here, he wanted to know everything  
17 that was going to be heard on Monday.

18 MS. TERRY: My understanding from our  
19 conversation was to go outside and try to articulate  
20 your objections to Conspiracy and B&W-CAN. So  
21 that's all --

22 MR. WILNER: Right.

23 THE COURT: But it's my understanding that  
24 we have discussed Monday trying to do everything we  
25 could with the documents and that's what you'll have

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1 wanted.

2 MR. WILNER: I'm not arguing the merits.

3 THE COURT: Finally you'll get a hearing  
4 on it.

5 MS. HARTLEY: I don't have an extra copy.

6 MR. WILNER: You don't have an extra copy  
7 of nicotine?

8 MR. MATTHEWS: Give that to His Honor.

9 MR. WILNER: Let me give this to His

10 Honor. Sorry to break your arm.

11 That is a predominantly Merrill Williams  
12 related documents.

13 MR. NYHAN: Could you identify what that  
14 is?

15 MR. WILNER: Yeah, I will. In other  
16 words, the nicotine conspiracy documents are -- also  
17 B&W-NIC are primarily -- to us, they're the story  
18 of nicotine and Brown & Williamson but -- and  
19 others, but they're primarily taken from the Merrill  
20 Williams series, which were the early 1994  
21 documents.

22 And our position is not all of them have  
23 been ruled on. Many of them have, and we think  
24 they're all kind of together. There may be a couple  
25 that are different, and I'm happy to talk about

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1 those if there are some -- you know, if there's  
2 anything identified. But the lion's share of those  
3 are the Merrill Williams series. And so that would  
4 be primarily the arguments on those.

5 In other words, they raise that they're  
6 stolen and other objections and so forth. And there  
7 are privileged objections in there notably to the  
8 ones that are circled in the front, the implications  
9 of the hippo, which is Addison Yeaman (phonetic)  
10 document and several others that come along there.

11 I think we've -- in my handwriting, I've

12 indicated the privileged ones and circled them if  
13 we're going to keep -- if we're going to assert --  
14 you know, argue them. And I X-d them if they. And  
15 I probably will have to get a copy.

16 MR. MATTHEWS: I've got them.

17 MR. WILNER: Let me trade you, Your Honor.

18 THE COURT: I've got our notes.

19 MR. WILNER: Not that I care what you see,  
20 but I'll lose track of what I have. Thank you.  
21 Thank you, that's great.

22 So then the third set is the conspiracy  
23 set, which is here.

24 THE COURT: We're going to leave all of  
25 this here, and it will be secure.

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1 MR. WILNER: Okay. Here's the conspiracy  
2 set which is a mixed set and I'll tell you the  
3 origin of them to help us along, without arguing  
4 merits. Some of these are --

5 THE COURT: Which one do you want to give  
6 to me?

7 MR. WILNER: I'm sorry this one, I meant  
8 to.

9 System of the conspiracy set is from the  
10 Merrill Williams series, and some are Minnesota  
11 documents. And by "Minnesota documents," I mean  
12 collectively, the ones -- well, I was going to say  
13 the ones that are in the order, but I think it would  
14 be impossible for me to know that every single

15 document was the subject of that order, although I  
16 think the order was kind of a collective order.

17 But the lion's -- most of these are either  
18 from the Merrill Williams papers or are Minnesota  
19 documents. So to the extent that they are -- and I  
20 would add that, in the Minnesota documents, some are  
21 ordered produced but have not been admitted because  
22 either they weren't admitted or whatever. They  
23 don't have an exhibit stamp on them.

24 Others have been admitted. So if that  
25 matters, there are two sets. Well, they're not

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1 different sets. I'm just saying, of these  
2 documents, some have an exhibit stamp on them that  
3 say, Admitted in Minnesota; others are just part of  
4 the same collection that were ordered produced.

5 And they, in our opinion, go to the issue  
6 of conspiracy. Now, we're not necessarily -- in  
7 fact, in very few cases, do we believe we need to  
8 use the conspiracy exception to the hearsay rule.  
9 Most of these, I think are not -- it's not  
10 necessary to use that or even argue it because of  
11 other exceptions to hearsay if hearsay is raised and  
12 so forth.

13 But I didn't want to argue merits because  
14 we'd get into a big fight and be here all day. So  
15 the next group -- and we're coming to the end --

16 THE COURT: Okay.

17 MR. WILNER: -- is Brown & Williamson --  
18 we call it Brown & Williamson public documents, and  
19 these are mostly public issues rather than science,  
20 necessarily, and they are a collection of documents  
21 that come from Brown & Williamson. I was going to  
22 say are there any from BAT, and I don't think so,  
23 but I don't want to swear to that, because there may  
24 be some from BAT and some from Brown & Williamson.  
25 Public issues documents, a mix of

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1 documents from the Merrill Williams set and from  
2 Minnesota. There are claimed privileges on some of  
3 these. Looks like there's -- were these the ones  
4 they're offering or these the claimed privileges.

5 MS. HARTLEY: Claimed privileges.

6 MR. WILNER: So this has quite a long set  
7 of claimed privileges.

8 MS. HARTLEY: We may still want to argue  
9 them. We withdrew in the hopes of trying to get  
10 documents in.

11 MR. WILNER: Okay. I think that it's hard  
12 for me to say what the -- exactly every individual  
13 document, whether we have withdrawn it or arguing  
14 privilege at this second, but I can do that. I'm  
15 not sure I trust my penciled notes, but let's see --

16 MS. TERRY: Can I just --

17 MR. JARMEL: Woody, you know what I've  
18 done, while everybody is here. This is for you,  
19 Your Honor. I had this put together over lunch;



20 this is your set.

21 Now these are the 49 documents that  
22 Stephanie indicated this morning you were going to  
23 argue on Monday. And so taken, Judge, from our  
24 appendix that we've given you, that big thing, I've  
25 taken the 49 they said they're going to argue on

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1 Monday, put them in one appendix listed in the  
2 letter, tabbed according to their notebook  
3 orientation. So these are what I understand are the  
4 privileged documents we'll be addressing on Monday.

5 MR. WILNER: Which notebook is this from?

6 MR. MATTHEWS: All of the notebooks.

7 MR. JARMEL: I took the list that  
8 Stephanie gave me this morning of all of the 49  
9 documents that you guys are intending to argue on  
10 Monday, put it together in one notebook with a list  
11 in the front that corresponds to your notebook  
12 designations.

13 MR. WILNER: Okay. Whatever, all right.  
14 That's just privileged.

15 MR. JARMEL: Those are all the privileged  
16 documents that are going to be argued on Monday.

17 MR. WILNER: Okay. All right.

18 MS. TERRY: Can I ask you a question? A  
19 couple of days ago, we were talking about B&W-Pub  
20 and you had raised only five documents. Are you now  
21 putting in the entire binder again?

22 MR. WILNER: Right. I know that there  
23 are -- some are in.  
24 MS. TERRY: No, three are in.  
25 MR. WILNER: Three are in?

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1 MS. TERRY: Five others were raised with  
2 respect to these are the ones I'm going to get in  
3 terms of this whole binder. My question to you is,  
4 is it the whole set again?

5 MR. WILNER: I just don't remember. If  
6 you'll give us a moment, for some reason, I'm just  
7 kind of -- there's only five left that we're  
8 offering.

9 MS. HARTLEY: There's only five left that  
10 we're offering, of the ones you claimed privileged  
11 to.

12 MS. TERRY: We're not talking about  
13 privilege.

14 MR. WILNER: Regardless of whether we  
15 claimed privilege.

16 MS. TERRY: I'm talking about non.

17 MR. WILNER: Oh, nonprivileged.

18 MS. HARTLEY: All of the nonprivileged.

19 (Change of reporters, 4:00 p.m.)

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1                   MR. WILNER: Yes, I think we only went  
2 through the privileged.

3                   MS. TERRY: No, because I have these five  
4 for our hearing. Plaintiffs are only offering  
5 five. You're welcome to change your mind, I just  
6 want to have an idea of what to come in and argue.

7                   MR. WILNER: I think we ought to be  
8 prepared to offer the entire book. And if --  
9 obviously, if there's negotiation that you want to  
10 do prior to that, some kind of a trade-off, I'm not  
11 -- I'm always willing to talk.

12                  MS. TERRY: I'll trade you American.

13                  MR. WILNER: Huh?

14                  MS. TERRY: I'll trade you American.

15                  MR. WILNER: Trade the American for Brown  
16 & Williamson?

17                  MS. TERRY: Sure, that's fine.

18                  MR. WILNER: I'm willing.

19                  THE COURT: Do we have a deal?

20                  MR. WILNER: Yeah, we've got a deal.

21                  MR. NYHAN: But probably -- is the deal  
22 going to be consummated this year or next year?

23                  MR. WILNER: I think that's it for the  
24 tiny, little -- don't we have a little volume called  
25 AMA?

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1 MS. HARTLEY: TIC and TIRC is not in yet.  
2 There's no privilege claims, but I'm sure they have  
3 other objections.

4 MR. WILNER: Yeah.

5 MS. HARTLEY: There is a very tiny volume,  
6 which I don't have with me, called AMA.

7 MR. WILNER: Yeah, that was a straggler.  
8 We shouldn't have put that in a separate binder. It  
9 always manages to get itself lost among its bigger  
10 brothers.

11 MR. JARMEL: Judge, we are not going to  
12 get this done in two hours on Monday. Two was for  
13 privilege, now they've got nine hours' worth.

14 THE COURT: Well, we've got time.

15 MR. JARMEL: It's impractical. And I  
16 wanted to bring it to the Court's attention.

17 THE COURT: We can start at nine, if you  
18 choose, and go to whenever we finish.

19 MR. WILNER: That's fine, that's fine.

20 THE COURT: Or whenever we run out of  
21 time.

22 MR. WILNER: That's fine, Your Honor. I  
23 don't think it's going to be as bad as counsel says  
24 because a lot of them are very similar.

25 THE COURT: I don't mind starting at ten

1 and we can go the rest of the day. But I want to  
2 get -- I want to get it over with, for the most  
3 part. And that doesn't mean that there won't be any  
4 other objections to documents as we go along. But,  
5 I mean --

6 MR. WILNER: Right. But in the interest  
7 of completeness --

8 THE COURT: Let's get done what we can.

9 MR. WILNER: Let's identify these. I  
10 don't know if there are objections. But we have  
11 a binder of statements, mostly they are public  
12 statements. They are public releases by the Tobacco  
13 Institute.

14 THE COURT: Let me ask you this, Woody.

15 MR. WILNER: Yeah.

16 THE COURT: Would it help to start at  
17 10:00, so that y'all can get together earlier than  
18 that on the documents?

19 MR. WILNER: Fine, happy to do it.

20 THE COURT: Because there may be some that  
21 are withdrawn or some that you don't care about or  
22 some that you don't really care about putting in.

23 MR. WILNER: Sure, I agree.

24 THE COURT: I don't care about going down  
25 them document by document.

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1 MR. WILNER: I agree, I agree. We're  
2 happy to do it.

3           THE COURT:   Okay.   Well, let's do it.   We  
4   will have the hearing at 10:00 and we will just go  
5   till we finish.   We may break for lunch, if we are  
6   going to -- y'all can meet here at nine.

7           MR. WILNER:   Just for completeness, we  
8   have TI, which are public statements of the Tobacco  
9   Institute; TIRC, which are public statements of the  
10   CTR or the TIRC, and a little volume called AMA,  
11   which are mostly -- which are American Tobacco  
12   letters to the AMA.   And I guess it just fell out  
13   (examines documents).

14          MS. HARTLEY:   They have it.

15          MR. WILNER:   You've got it.   It's a little  
16   volume and we lost it.

17          THE COURT:   Maybe they'll let you use  
18   theirs.

19          MR. MATTHEWS:   We got it.   We had it this  
20   morning, Judge.

21          MR. WILNER:   It was being carried over or  
22   something.   That's fine, we can come in -- maybe we  
23   should meet in the courtroom at nine and see if --  
24   or in chambers, or whatever, and see if we can,  
25   if we can horse trade down some of these documents.

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1           THE COURT:   I don't care, but I need to  
2   let them know to let you in the courtroom.   Because  
3   if you're going to be here at nine talking, I don't  
4   want to be here till almost ten.   But I'll be here  
5   at nine, if you want me to.

6 MR. WILNER: I think that's a good idea.  
7 Why don't we meet at -- I'm not answering for  
8 counsel, but I'm willing to meet at nine if anybody  
9 wants to come. And we'll try our best.  
10 MS. TERRY: We have tried to negotiate.  
11 At least Stephanie and I have, Judge.  
12 THE COURT: Yes. And I think y'all have  
13 done a commendable job so far in cutting them down  
14 on both sides.  
15 MR. WILNER: That's fine, I have no  
16 objection. We will be delighted to cut them down,  
17 but we want something -- we want some concessions,  
18 too. And you've done that. So maybe we can do it.  
19 MS. TERRY: Judge -- am I interrupting,  
20 I'm sorry.  
21 MR. WILNER: No.  
22 MS. TERRY: Is that in terms of the  
23 documents, Woody?  
24 MR. WILNER: Yes. Except to say I always  
25 get caught, somebody always comes back and says,

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1 Well, you said. We told you we had the package  
2 insert and things like that.  
3 MS. HARTLEY: Medical records.  
4 MS. TERRY: The historical summary, was  
5 that discussed?  
6 MS. HARTLEY: Historical summary, that's  
7 been marked.

8 MR. WILNER: It's marked. So we can argue  
9 that later, when you say. If that's all.  
10 MS. TERRY: I'm just asking you -- don't  
11 come out with another binder this week and say, We  
12 want to get these in, too -- have we seen all these  
13 documents which you mentioned?  
14 MR. WILNER: These are the ones you had --  
15 MS. HARTLEY: Unless we're overlooking  
16 something, which is possible on Friday afternoon.  
17 MR. WILNER: I'm pretty tired.  
18 MS. HARTLEY: But it wouldn't be anything  
19 you want.  
20 MS. TERRY: B&W-Net., AMA, TRC, B&W Pub.,  
21 Tobacco Institute.  
22 MS. HARTLEY: All the others are in  
23 evidence, right.  
24 MS. TERRY: Yes.  
25 MS. HARTLEY: So those are all the volumes

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1 you have, right?  
2 MS. TERRY: B&W Pub, the three.  
3 MR. WILNER: No, there was another one.  
4 We pulled a lot out of that. We reserved that we  
5 would go back and argue it.  
6 MS. TERRY: B&W Can One.  
7 MR. WILNER: B&W Can One. See, I don't  
8 remember the status of that.  
9 MS. TERRY: The status of that is there  
10 were a number of objections on that. And we made an



11 agreement outside the Court's presence here one day  
12 and you said, okay, fine, then it went in.

13 MR. WILNER: I just don't remember what  
14 the status is. So subject to there may be a  
15 document in B&W Can One that I want to reoffer, so  
16 -- don't hold me to that. I don't really think so,  
17 but I just can't remember.

18 MS. HARTLEY: I think there were only  
19 three, three to five documents we pulled out of  
20 B&W Can, not very many.

21 MR. WILNER: I just can't remember. I  
22 didn't think there was anything different.

23 THE COURT: Yes, sir.

24 MR. NYHAN: Judge, looking at the volume  
25 of paper, I'm beginning to wonder when I'm going to

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1 get to start my case. I mean, are we going to have  
2 document days when these are published to the jury?  
3 What is our schedule looking like now?

4 MR. WILNER: Well, no, I don't anticipate  
5 document days, per se. I do need to publish some  
6 documents, but I don't -- don't feel that the number  
7 will in any way slow us down. In fact, I think it  
8 speeds us up when these documents are in evidence  
9 and we don't have to take each one out and move it  
10 in independently. It runs much faster.

11 So the answer is, no, I would not be  
12 concerned about the number of documents. I think

13 once we get some ruling about what's in and what's  
14 out, we can go through. And if the volume is in,  
15 we can hand it to the witness and say go to number  
16 three and we go through, whatever it is.

17 THE COURT: So you're still talking about  
18 finishing on Wednesday then?

19 MR. WILNER: Well, it depends. I  
20 anticipate I'll be done with Dr. Feingold on Tuesday,  
21 maybe before the end of the day, hopefully. I don't  
22 know how long he'll be crossed.

23 But I do -- I have Dr. Farone, who is  
24 coming, who is a cigarette design expert. He is not  
25 going to be as long as Dr. Feingold, obviously. He

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1 should be on and off within less than a day and that  
2 is -- other than Angie Widdick, that's it.

3 THE COURT: How long do you think  
4 Ms. Widdick will be?

5 MS. HARTLEY: Not long, the direct will not  
6 be long.

7 THE COURT: I don't know how long "not  
8 long" means.

9 MS. HARTLEY: An hour on direct.

10 MR. WILNER: An hour on direct.

11 And we have put in most of our, most of our  
12 depositions, which tend to sometimes be -- you know,  
13 be pushed to the end. But we already have done  
14 that. So though we would like to be a day ahead of  
15 where we are, we are not that bad.

16 THE COURT: What about cross-examination of  
17 Dr. Feingold?

18 MR. NYHAN: It certainly won't be as long  
19 as the direct.

20 THE COURT: An estimate.

21 MR. NYHAN: Direct, it sounds like direct  
22 is two days, cross may be -- may be a day.

23 THE COURT: Okay. So that would be like,  
24 then, Thursday?

25 MR. WILNER: It would be Wednesday. So

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1 then we put on Dr. Farone on -- that would be half  
2 Tuesday, a quarter of Tuesday, three quarters of  
3 Wednesday, maybe we put on --

4 MS. HARTLEY: Farone on Wednesday.

5 MR. WILNER: Farone on Wednesday. I don't  
6 know whether we'll get him off or not. Hopefully,  
7 we'll get him off.

8 MS. HARTLEY: Finish by Thursday.

9 MR. NYHAN: Then we have a half day Friday?

10 THE COURT: You've got something you could  
11 do starting Friday morning?

12 MR. NYHAN: We will come up with something,  
13 because we don't want to slow things down.

14 THE COURT: I'm talking about rather than  
15 having a witness here from Friday to Monday.

16 MR. NYHAN: Yes, we will figure it out.

17 MR. WILNER: What about the net worth, have

18 we resolved that?

19 MS. HARTLEY: They were supposed to get us  
20 an interrogatory. I was told they were.

21 MR. NYHAN: There won't be a problem on  
22 that.

23 MS. HARTLEY: I'm sure.

24 MR. WILNER: Of course, housekeeping always  
25 takes longer than we think, so forth and so on. But

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1 that's the idea.

2 MR. RILEY: Your Honor, we discussed  
3 getting access to the pathology. Since I understand  
4 Dr. Feingold will not be talking about the pathology  
5 now, can we make arrangements for that to be  
6 transferred.

7 MR. WILNER: As soon as Dr. Feingold is  
8 finished testifying, he will -- we will turn over the  
9 pathology.

10 MR. NYHAN: That means we won't get the  
11 pathology for another week. And they've kept it.  
12 They refused to give it to us. We think we ought to  
13 have it now, Judge.

14 MR. WILNER: I need it over the weekend. I  
15 said that I needed it and I do. I need it over the  
16 weekend to work with Dr. Feingold.

17 MR. NYHAN: He could have given it to us  
18 last week so we could have had it.

19 THE COURT: How long do you need it for?

20 MR. NYHAN: I think we need it for maybe

21 two days so that we can get some photographs made.

22 THE COURT: Then it takes you how long to  
23 get the report?

24 MR. NYHAN: Well, we have got to send it  
25 out, have it photographed. That's really all we need

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1 it for is just to photograph.

2 MR. WILNER: That's fine. It's fine, I  
3 mean, as soon as -- as soon as we are done with it,  
4 I think that this -- that after the weekend we will  
5 be done with it.

6 THE COURT: You'll give it to them Tuesday  
7 morning?

8 MR. WILNER: Yeah, I can give it to them  
9 Tuesday morning.

10 MR. NYHAN: All right.

11 THE COURT: Okay. Anything else we can do  
12 today?

13 MR. WILNER: Have a nice weekend.

14 THE COURT: I need, if y'all don't have  
15 them, the lists from you.

16 MR. MATTHEWS: I turned it in, Judge.

17 MS. TERRY: I turned it in.

18 THE COURT: So they have it, all right.

19 THE COURT: Do you want to start here at  
20 9:00 and have me come in at ten? I don't have a  
21 problem with that. The books are here and  
22 everything. Or you can do it in the courtroom, I

23 don't have a problem with that. But I need to tell  
24 Wackenhut.  
25 MR. WILNER: I don't know. We don't care.

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1 If it's more comfortable for Your Honor in here,  
2 let's do it in here.  
3 THE COURT: Well, whether it's more  
4 comfortable to you. I want to do it in here at  
5 10:00.  
6 MR. WILNER: We might as well stay in here.  
7 THE COURT: Because I don't want people  
8 wandering in and out of the courtroom. I can control  
9 it better in here.  
10 MR. WILNER: That's right.  
11 THE COURT: Y'all going to be here at 9:00?  
12 MR. WILNER: Yes.  
13 THE COURT: If I'm not going to be here,  
14 then somebody has to let you in. But all the  
15 Wackenhut people have keys. In fact, I may be here  
16 anyway to make sure.  
17 (In-chamber proceedings were adjourned at  
18 4:15 p.m.)

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